COMPILATION

OF

PUBLIC TIMBER LAWS

AND

REGULATIONS AND DECISIONS THEREUNDER.

Issued February 14, 1903.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1903.

COMPILATION

OF

PUBLIC TIMBER LAWS

AND

REGULATIONS AND DECISIONS THEREUNDER.

Issued February 14, 1903.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1903.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 14, 1903.

The following compilation of existing laws relating to timber on the public lands, with the rules and regulations thereunder, and decisions, opinions, and rulings in relation thereto, is issued for the information of those concerned.

W. A. RICHARDS,
Commissioner.

Approved:
E. A. HITCHCOCK, *Secretary.*

SYNOPSIS OF LAWS RELATING TO TIMBER ON PUBLIC LANDS.

Section 2458, U. S. R. S., authorizes the Secretary of the Navy, under the direction of the President, to cause such vacant and unappropriated lands of the United States as produce the live oak and red cedar timbers to be explored, and selection to be made of such tracts or portions thereof, where the principal growth is of either of such timbers, as in his judgment may be necessary to furnish for the Navy a sufficient supply of the same.

Section 2459, U. S. R. S., authorizes the President to appoint surveyors of public lands to explore and select the lands described in the preceding section, and provides that the tracts thus selected, with the approbation of the President, shall be reserved, unless otherwise directed by law, from any future sale of public lands, and be appropriated to the sole purpose of supplying timber for the Navy of the United States.

Section 2460, U. S. R. S., authorizes the President to employ so much of the land and naval forces of the United States as may be necessary effectually to prevent the felling, cutting down, or other destruction of the timber of the United States in Florida, and to take such other measures as may be advisable for the preservation of the timber of the United States in Florida.

Section 2461, U. S. R. S., provides a fine of not less than triple the value of the timber and imprisonment not exceeding twelve months in instances in which timber is cut or removed from public lands reserved or purchased for the use of the Navy or from any other public lands for use other than for the Navy of the United States. (See sec. 4751, U. S. R. S.) See also the following: Act of March 1, 1817, 3 Stat., 347 (secs. 2458 and 2459, U. S. R. S.), and act of February 23, 1822, 3 Stat., 651 (sec. 2460, U. S. R. S.).

Section 2462, U. S. R. S., provides for the forfeiture to the United States of any vessel having on board, with knowledge of the master, owner, or consignee, timber taken from Naval Reserve or other public lands with intent to transport the same to any port or place within the United States or for export to any foreign country, and further provides that the captain or master of such vessel shall pay to the United States a sum not exceeding $1,000. (See sec. 4751, U. S. R. S.)

Section 2463, U. S. R. S., provides that collectors of customs in Alabama, Mississippi, Louisiana, and Florida, before allowing clearance to any vessel having on board live-oak timber, must ascertain that the same was cut from private lands, or if from public lands, by consent of the Navy Department; and also provides that timely prosecution be instituted against parties guilty of depredations on live oak in those States. (See secs. 4205 and 4751, U. S. R. S.)

Section 4205, U. S. R. S., reads as follows: "Collectors of the collection districts within the States of Florida, Alabama, Mississippi, and Louisiana, before allowing a clearance to any vessel laden in whole or in part with live-oak timber, shall ascertain satisfactorily that such timber was cut from private lands, or if from public lands, by consent of the Department of the Navy." (See sec. 2463.)

Section 4751, U. S. R. S., provides that all penalties and forfeitures under sections 2461, 2462, and 2463 shall be recovered, etc., under the direction of the Secretary of the Navy, one-half to be paid to the informers or captors and the other half to the Secretary of the Navy, and also authorizes the Secretary to mitigate any fine, penalty, or forfeiture so incurred.

Section 5264, U. S. R. S., provides for the use of timber by telegraph companies for the construction, maintenance, and operation of lines of telegraph.

Section 5388, U. S. R. S., provides a fine of not more than $500 and imprisonment not more than twelve months in every instance in which timber is unlawfully cut or injured on lands reserved or purchased for military or other purposes. (See secs. 2460 and 2463, U. S. R. S. See also act of June 4, 1888; 25 Stat., 166, amending this section.)

Act of March 3, 1875 (18 Stat., 481), section 1, provides a fine of not exceeding $500 or imprisonment not exceeding twelve months in instances in which ornamental or other trees on public lands which have been reserved or purchased by the United States for any public use have been cut or injured. Section 2 provides a fine not exceeding $200 or imprisonment not exceeding six months for the breaking open or destroying of any gate, fence, hedge, or wall inclosing any lands reserved or purchased by the United States. Section 3 provides a penalty of not exceeding $500 or imprisonment not exceeding twelve months for the breaking in of any inclosure around lands reserved or purchased by the United States, and permitting cattle, horses, and hogs to enter therein when they may or can destroy the grass, trees, or other property of the United States.

Act of March 3, 1875 (18 Stat., 482), grants the right of way through the public lands of the United States to any railroad company which has filed with the Secretary of the Interior due proof of its organization, etc., and also the right to take from lands adjacent to the line of the road timber necessary for the *construction* of the road.

The several land grants to railroads also authorize them to cut timber from public lands for *construction* purposes. This authority, however, is confined strictly to timber for construction purposes in every grant except that to the Denver and Rio Grande Railroad, which authorizes said road to take timber for *repairs* also on the part of the line constructed thereunder.

Act of September 29, 1890 (26 Stat., 496), forfeited the grants to all uncompleted railroads to the extent of the grants for the unconstructed portions of such roads.

Act of April 30, 1878 (20 Stat., 46), section 2, provides that if any timber cut on the public lands shall be exported from the Territories of the United States it shall be liable to seizure by United States authority wherever found.

Act of June 3, 1878 (20 Stat., 88), authorizes citizens and bona fide residents of Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, and Montana, and all other mineral districts, to use for building, agricultural, mining, or other domestic purposes, timber on public lands therein, said lands being mineral and not subject to entry under existing laws of the United States except for mineral entry.

Act of June 3, 1878 (20 Stat., 89), section 1, provides for the sale of unreserved, unoffered surveyed public timber lands in California, Oregon, Nevada, and Washington, in quantities not exceeding 160 acres, to any one person or association of persons, at $2.50 per acre. Section 4 prohibits the cutting, removing, or destroying of any timber on public lands in the States named with intent to export or dispose of the same, under penalty to the trespasser and the owner or consignee of any vessel or railroad on which the timber is transported, of a fine of not less than $100 nor more than $1,000; and provides "that nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements." Section 5 provides that any person who is prosecuted in the States named for trespass under section 2461, U. S. R. S., if not for export from the United States, may be relieved from prosecution by paying a sum equal to $2.50 per acre for the land on which the timber was cut.

This act was made applicable to all the public-land States by act of August 4, 1892 (27 Stat., 348).

Act of June 15, 1880 (21 Stat., 237), provides that where timber was unlawfully cut from public timber lands prior to March 1, 1879, and the lands have subsequently been entered and the Government price paid therefor in full, no criminal proceedings for trespass shall be further maintained; and no civil suit shall be maintained for timber taken in clearing the land for cultivation, or working a mining claim, or for agricultural or domestic purposes, or for maintaining the improvements of a settler, etc., or for timber taken or used without fraud or collusion by any person who in good faith paid the officers or agents of the United States for same, or for an alleged conspiracy in relation thereto.

Act of June 4, 1888 (25 Stat., 166), provides as follows: "That section fifty-three hundred and eighty-eight of the Revised Statutes of the United States be amended so as to read as follows: 'Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than five hundred dollars or be imprisoned not more than twelve months, or both, in the discretion of the court.'"

Act of February 16, 1889 (25 Stat., 673), provides that the President may authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, remove, and dispose of the dead or down timber thereon for the sole benefit of the Indians.

It is further provided that whenever there is cause to believe that the timber has been killed or otherwise injured for the purpose of securing its sale under this act such authority shall not be granted.

Act of March 3, 1891 (26 Stat., 1093), entitled "An act to amend section eight of an act approved March third, eighteen hundred and ninety-one," etc., provides that "in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands, or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands."

(See below act of February 13, 1893 (27 Stat., 444), extending this act to New Mexico and Arizona, and act of March 3, 1901 (31 Stat., 1436), extending the act to California, Oregon, and Washington.)

Section 24 of the act of March 3, 1891 (26 Stat., 1095), provides for the establishment of forest reservations in any State or Territory having public lands bearing forests.

(See below act of June 4, 1897 (30 Stat., 34–36), providing for the administration of forest reserves created under this section.)

Act of August 4, 1892 (27 Stat., 348), extends the provisions of the act of June 3, 1878 (20 Stat., 89), to all the public-land States.

Act of February 13, 1893 (27 Stat., 444), extends the provisions of the act of March 3, 1891 (26 Stat., 1093), to include the Territories of New Mexico and Arizona.

Act of January 19, 1895 (28 Stat., 634), provides for the utilization of burned timber on certain unperfected homestead entries in Wisconsin, Minnesota and Michigan.

Section 2 of the act of February 20, 1896 (29 Stat., 11), to open certain forest reservations in the State of Colorado for the location of mining claims, authorizes the owners of such claims to fell and remove timber therefrom for actual mining purposes in connection with the particular claim from which the timber is felled or removed, but prohibits the felling or removing of timber from any other portions of said reservations by private parties for any purpose whatever.

Act of February 26, 1897 (29 Stat., 599), entitled "An act concerning certain homestead lands in Florida," provides "that all persons actually occupying homesteads in good faith in any of the following-named counties in said State of Florida, to wit, Alachua, Lafayette, Levy, Suwanee, Bradford, Baker, and Columbia, at the time of the storm on or about September twenty-ninth, eighteen hundred and ninety-six, are hereby granted the right to sell or otherwise dispose of the fallen timber on their homestead entries felled by said storm, and to devote the proceeds of such sale or barter to the improvement of their homesteads or support of themselves or their families."

Act of June 4, 1897 (30 Stat., 34–36), provides for the survey of the public lands which have been or which may be designated as forest reserves under section 24 of the act of March 3, 1891 (26 Stat., 1095), and for the control and administration of such reserves.

Act of June 7, 1897 (30 Stat., 90), provides that the Secretary of the Interior may authorize the Indians residing on any Indian reservation in the State of Minnesota to fell, cut, remove, sell, or otherwise dispose of the dead timber on such reservation, or any part thereof, for the sole benefit of such Indians; also that he may authorize the Chippewa Indians of Minnesota who have any interest or right in the proceeds derived from the sales of ceded Indian lands or the timber growing thereon, whereof the fee is still in the United States, to fell, cut, remove, sell, or otherwise dispose of the dead timber on such ceded land.

It is further provided that when there is reason to believe that the timber has been killed or otherwise injured for the purpose of securing its sale under this act the authority shall not be granted.

Act of May 14, 1898 (30 Stat., 409), section 2, grants to any duly organized railroad company the right of way through the lands of the United States in the district of Alaska upon compliance with certain conditions, and also "the right to take from the lands of the United States, adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad." Section 6 authorizes the Secretary of the Interior to issue a permit, subject to certain restrictions and conditions, to any responsible person, company, or corporation, for a right of way over the public domain in Alaska, to construct wagon roads and tramways, and "the privilege of taking all necessary material from the public domain in said district for the construction of said wagon roads and tramways," etc. Section 11 authorizes the Secretary of the Interior to cause to be appraised the timber, or any part thereof, upon the public lands of Alaska, and from time to time to sell so much thereof as he may deem proper, at not less than the appraised value, in such quantities to each purchaser as he shall prescribe, to be used in the district of Alaska, but not for export therefrom, such sales to be limited to actual necessities for consumption in the district from year to year.

It is also provided that the Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in Alaska, by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes.

Act of July 1, 1898 (30 Stat., 593), grants the right to cut timber for mining and domestic purposes at such prices, and subject to such regulations, as may be prescribed by the Secretary of the Interior, from that portion of the Colville Indian Reservation in the State of Washington which was vacated and restored to the public domain by the act of July 1, 1892 (27 Stat., 62), the net proceeds to be set apart and disposed of according to the provisions of section 2 of said act.

Act of July 1, 1898 (30 Stat., 618), provides "that section eight of an act entitled 'An act to repeal the timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended as follows: 'That it shall be lawful for the Secretary of the Interior to grant permits, under the provisions of the eighth section of the act of March third, eighteen hundred and ninety-one, to citizens of Idaho and Wyoming, to cut timber in the State of Wyoming west of the Continental Divide, on the Snake River and its tributaries, to the boundary lines of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to the State of Idaho.'"

Act of May 5, 1900 (31 Stat., 169), provides "that an act entitled 'An act to prevent fires on the public domain,' approved February twenty-fourth, eighteen hundred and ninety-seven, be, and the same is hereby, amended so as to read as follows: 'That any person who shall willfully or maliciously set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall leave or suffer fire to burn unattended near any timber or other inflammable material, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States having jurisdiction of the same shall be fined in a sum not more than five thousand dollars, or be imprisoned for a term of not more than two years, or both.

"'SEC. 2. That any person who shall build a fire in or near any forest, timber, or other inflammable material upon the public domain shall, before leaving said fire, totally extinguish the same. Any person failing to do so shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court in the United States having jurisdiction of the same shall be fined in a sum not more than one thousand dollars or be imprisoned for a term of not more than one year, or both.

"'SEC. 3. That in all cases arising under this act the fines collected shall be paid into the public-school fund of the county in which the lands where the offense was committed are situated.'"

Act of March 3, 1901 (31 Stat., 1436), provides "that section eight of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, as amended by an act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page ten hundred and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended as follows: After the word 'Nevada,' in said amended act, insert the words 'California, Oregon, and Washington.'"

Act of March 3, 1901 (31 Stat., 1439), provides "that the provisions of chapter five hundred and fifty-nine of the Revised Statutes of the United States, approved March third, eighteen hundred and ninety-one, limiting the use of timber taken from public lands to residents of the State in which such timber is found, for use within said State, shall not apply to the south slope of Pryor Mountains, in the State of Montana, lying south of the Crow Reservation, west of the Big Horn River, and east of Sage Creek; but within the above-described boundaries the provisions of said chapter shall apply equally to the residents of the States of Wyoming and Montana, and to the use of timber taken from the above-described tract in either of the above-named States.

RECAPITULATION.

ACTS FOR THE PROTECTION AND PRESERVATION OF PUBLIC TIMBER.

Sections 2458 and 2459, U. S. R. S. Authorize the selection and reservation of public lands containing live-oak or red-cedar timber for the sole purpose of supplying timber for the Navy of the United States.

Section 2460, U. S. R. S. Authorizing use of Army and Navy to prevent timber depredations in Florida.

Section 2461, U. S. R. S. Prohibiting the cutting of timber from any public lands for any purpose whatever, except for the use of the Navy of the United States.

Section 2462, U. S. R. S. Providing penalties for transporting or exporting any timber cut from any public lands not reserved or purchased for furnishing timber for the Navy.

Sections 2463 and 4205, U. S. R. S. Providing that collectors of customs in Alabama, Florida, Louisiana, and Mississippi must see to it that no live-oak timber is transported or exported out of said States.

Section 4751, U. S. R. S. Providing relative to recovery and disposition of penalties and forfeitures under sections 2461, 2462, and 2463.

Section 5388, U. S. R. S. Prohibiting the cutting or destroying of timber on reserved lands. (Amended by act of June 4, 1888; 25 Stat., 166.)

Act of March 3, 1875 (18 Stat., 481). Prohibiting the cutting, destroying, or injuring of any trees on reserved lands.

Act of April 30, 1878, section 2 (20 Stat., 46). Providing that if any timber cut on the public lands shall be exported from the Territories of the United States it shall be liable to seizure by United States authority wherever found.

Act of June 3, 1878, section 4 (20 Stat., 89). Prohibiting the cutting of timber in California, Oregon, Nevada, or Washington for export, disposal, or transportation. This act is made applicable to all the public-land States by the act of August 4, 1892 (27 Stat., 348).

Act of June 4, 1888 (25 Stat., 166). Prohibiting the cutting of timber on lands reserved for military or other purposes, or on Indian reservations, etc.

Act of March 3, 1891 (26 Stat., 1095). Authorizing the President of the United States to make forest reservations.

Act of August 4, 1892 (27 Stat., 348). Extending the provisions of the act of June 3, 1878 (20 Stat., 89), to all the public-land States.

Act of February 20, 1896 (29 Stat., 11). Opening certain forest reservations in the State of Colorado for the location of mining claims.

Act of June 4, 1897 (30 Stat., 34–36). Provides for the survey, government, and protection of forest reserves created under authority of the act of March 3, 1891 (26 Stat., 1095).

Act of May 5, 1900 (31 Stat., 169). To prevent forest fires on the public domain.

ACTS AUTHORIZING THE USE OF PUBLIC TIMBER.

Section 5264, U. S. R. S. Providing for the use of public timber by telegraph companies.

Act of March 3, 1875 (18 Stat., 482). Authorizing right-of-way railroads to procure timber from public lands for construction purposes.

The several acts making land grants to railroad companies.

Act of June 3, 1878 (20 Stat., 88). Authorizing the cutting of timber from public mineral lands in Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, and Montana for domestic purposes.

Act of June 3, 1878 (20 Stat., 89). Authorizing the sale of public timber lands in California, Oregon, Nevada, and Washington, and the cutting of timber by miners and agriculturists for use on their claims, and the taking of timber for the use of the United States.

This act, by the act of August 4, 1892 (27 Stat., 348), is extended to all the public-land States. (See below.)

Act of February 16, 1889 (25 Stat., 673). Authorizing Indians on reservations to cut, remove, and dispose of dead and down timber.

Act of March 3, 1891 (26 Stat., 1093). Authorizing the cutting of timber in Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, Alaska, Nevada, and Utah for agricultural, mining, manufacturing, or domestic purposes.

The act of February 13, 1893 (27 Stat., 444), extends the operation of this act to New Mexico and Arizona, and the act of March 3, 1901 (31 Stat., 1436), extends its operation to California, Oregon, and Washington. (See below.)

Act of August 4, 1892 (27 Stat., 348). Extending the provisions of the act of June 3, 1878 (20 Stat., 89), to all the public-land States.

Act of February 13, 1893 (27 Stat., 444). Extending the provisions of the act of March 3, 1891 (26 Stat., 1093), to include the Territories of New Mexico and Arizona.

Act of January 19, 1895 (28 Stat., 634). Providing for the utilization of burned timber on certain unperfected homestead entries in Wisconsin, Minnesota, and Michigan.

Act of February 20, 1896 (29 Stat., 11). Opening certain forest reservations in the State of Colorado for the location of mining claims.

Act of February 26, 1897 (29 Stat., 599). Providing for the utilization of certain felled timber on unperfected homestead entries in certain counties in Florida.

Act of June 7, 1897 (30 Stat., 90). Providing for the sale of dead timber on the ceded Chippewa Indian Reservation in Minnesota.

Act of May 14, 1898 (30 Stat., 409), sections 2 and 6. Authorizing right-of-way railroads and wagon roads and tramways in Alaska to take timber, etc., for construction purposes; and section 11, providing for the sale and the free use of timber in Alaska.

Act of July 1, 1898 (30 Stat., 593). Authorizes the sale of timber from the north half of the Colville Indian Reservation, in the State of Washington, under regulations to be prescribed by the Secretary of the Interior.

Act of July 1, 1898 (30 Stat., 618). Authorizes the Secretary of the Interior to grant permits to citizens of Idaho and Wyoming to cut timber in Wyoming west of the continental divide on the Snake River and its tributaries, for agricultural, mining, or other domestic purposes, and to remove such timber to the State of Idaho.

Act of March 3, 1901 (31 Stat., 1436). Extends to residents of California, Oregon, and Washington the privilege of taking timber from public lands in said States under the act of March 3, 1891 (26 Stat., 1093).

Act of March 3, 1901 (31 Stat., 1439). Extends to citizens of Montana and Wyoming the privilege of taking timber under the provisions of the act of March 3, 1891 (26 Stat., 1093), from the tract specified in Montana for use in either of said States.

In addition to the above specific legislation in respect to timber on public lands the inceptive rights acquired by a homestead claimant are held to extend to the use of so much timber as it may be necessary to fell or remove in clearing the land for cultivation, or for buildings, fences, or other improvements on the land. See United States *v.* Levi W. Nelson (5 Sawyer, 68), cited on page 115; also Shiver *v.* United States (159 U. S., 491), cited on page 122.

SUMMARY.

The foregoing synopsis shows that section 2461, U. S. R. S. (act of March 2, 1831; 4 Stat., 472), constitutes the original policy respecting public timber, and the extent to which certain of the subsequent acts operate as modifications of same.

COMPILATION OF PUBLIC TIMBER LAWS AND REGULATIONS AND DECISIONS THEREUNDER.

SECTION 2461, U. S. R. S.

(Act of March 2, 1831; 4 Stat., 472.)

If any person shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying any live-oak or red-cedar trees, or other timber standing, growing, or being on any lands of the United States, which, in pursuance of any law passed, or hereafter to be passed, have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the Navy of the United States; or if any person shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing from any such lands which have been reserved or purchased, any live-oak or red-cedar trees, or other timber, unless duly authorized so to do, by order, in writing, of a competent officer, and for the use of the Navy of the United States; or if any person shall cut, or cause or procure to be cut, or aid, or assist or be employed in cutting any live-oak or red-cedar trees, or other timber on, or shall remove, or cause or procure to be removed, or aid or assist, or be employed in removing any live-oak or red-cedar trees or other timber from any other lands of the United States, acquired, or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the Navy of the United States; every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months. (See sec. 4751.)

TIMBER DEFINED.

UNITED STATES *v.* STORES AND ANOTHER.

Circuit court, southern district of Florida (14 Fed. Rep., 824).

PENALTY—CUTTING TIMBER ON PUBLIC LANDS—"TIMBER" DEFINED.

The term "timber," as used in section 2461, Revised Statutes, does not apply alone to large trees fitted for house or ship building, but includes trees of any size, of a character or sort that may be used in any kind of manufacture or the construction of any article.

PENALTY—PROSECUTION FOR—USE OF TREES NO JUSTIFICATION.

Using trees for firewood or burning into charcoal is no justification of the cutting.

SAME—HOMESTEAD ENTRY—NO EFFECT ON TITLE.

A homestead entry works no change in the title of lands which can prevent a prosecution under the said section.

UNITED STATES *v.* PETER DARTON.

Circuit court of the United States (6 McLean, 46).

Under the act of 1831, for the punishment of offenses in cutting and removing timber from the United States lands, the rule of proof is fixed by the statute. The Government must prove the cutting on the lands specified; the defendant may rebut the same by showing circumstances of ignorance as to the section lines or mistake.

The proof must correspond with the charge—cutting oak is not cutting pine timber.

The proof of the act places the burden of explanation on the defendant. From an unlawful act an unlawful intent will be inferred.

A reasonable doubt is that which relates either to the character or the force of the testimony, and not a mere conjecture.

WILKINS, *J.:*

The defendant was tried on an indictment charging him with removing and cutting timber on Government lands. The testimony showed that his father owned a mill seat and various tracts of land in the vicinage of the lands described in the indictment; that he resided at the mill, as the agent of his father who lived in Chicago, and was under instructions to avoid cutting on the Government lands; that a number of trees were cut by mistake across the lines, which were subsequently ascertained by actual survey, the defendant accompanying the surveyor and showing the corner posts; and when he ascertained that he had cut over his lines he wrote to his father and caused the quarter section on which the timber was cut to be entered at the Land Office, the certificate of which was given in evidence.

It was contended on the part of the government—

First. That circumstances showing ignorance and mistake, if believed by the jury, constituted no defense.

Second. That a *subsequent* entry of the lands was no defense.

CHARGE OF THE COURT.

The prisoner at the bar, Peter Darton, whose true deliverance between him and the United States you are obligated by your solemn oaths to make, according to the evidence given you in court, is charged with timber cutting and timber removing on and from the lands of the United States. The peculiar offense is created by and defined and described in the statutes of the United States.

The act of March 2, 1831, by its second section, constitutes three general classes of offenses, with their respective accessorial subdivisions.

The court will enumerate them in their order, that you may be better enabled to understand the particular offense now under consideration.

The first is the *cutting* and *removing* naval timber, specifically named *red cedar* and *live oak*, on lands especially selected and reserved by the Government, or aiding in such acts, or wantonly destroying on such lands such naval timber.

By a previous enactment of Congress, the 1st of March, 1817, entitled "An act," making reservation of certain public lands "to supply timber for naval purposes," it was made the duty of the Secretary of the Navy, under the direction of the President of the United States, to cause such vacant and unappropriated public lands as produced the live-oak and red-cedar timbers to be explored and to select such tracts as, according to his judgment, were necessary to furnish the Navy of the United States a sufficient supply of naval timber.

It was then declared an offense, punishable by fine and imprisonment, for any person to cut *any timber* on such reserved tracts *without authority to do so by order of a competent officer.*

At the same time it was declared criminal to cut or remove, or be employed in removing, the naval timber specified, with intent to dispose of the same for transportation, from the same description of the public lands.

Such, with other measures of a penal character, and with the avowed design of preserving a supply of timber for the United States Navy, were the salutary provisions of the statute of 1817.

But the Government was the proprietor of other lands, on which grew other timber, valuable in a great degree for other purposes than shipbuilding. Much of these lands were surveyed by and under national authority, and by various statutory enactments were opened to settlements, and offered at a *fixed* price, which could neither be augmented nor lessened by demand.

The policy of these statutes was twofold: First, the speedy settlement of the public domain, and thereby converting the wilderness into a garden; and the acquisition of a revenue from the public sales. In furtherance of both objects it was desirable that the lands should be so far protected from spoliation as to encourage immigration and induce settlement and sale.

Moreover, it was discovered that the protection afforded by the act of 1817 was not sufficiently extensive as to naval timber growing elsewhere than on the reservations; and the public lands in the North and Southwest, being repeatedly stripped of valuable house timber by lawless trespassers, the National Legislature was moved to amend and enlarge the provisions of the act of 1817 by those of 1831, embracing *other* lands than the reserved lands, naval timber on *other* lands, and *other* timber than naval timber on the unreserved public lands of the United States. Thus originated the other two classes as designated in the first section of the last act, namely:

Second. The offense of cutting naval timber on other lands, etc.

Third. The offense of cutting or removing, etc., *other* timber than naval timber on *other* lands than naval lands, with the intent to *export*, dispose of, use, or employ the same *in any manner whatsoever, other than for the use of the Navy of the United States.*

This last comprehends the charges set forth in this indictment, which contains four counts.

* * * * * * *

Before any application of the law to the facts of this case the court will briefly detain your attention on two prominent propositions involved:

First. What must be proved by the Government in order to sustain the prosecution.

Second. What must be proved by the defendant, in case the Government has made a case to warrant a conviction, as matter of complete exculpation.

What must be proved by the Government. The rule of proof is fixed by the statute. The offense is cutting or removing timber from Government lands, with the evil intent described.

The fact then must be fully established by conclusive proof that timber of the kind described was cut by the defendant or by his procurement, and that the same was cut on the township and section and range specially set forth. Cutting *other* timber than that charged will not suffice. If pine trees or pine logs are charged, proof of oak or hickory will not do. And so also, if the cutting is on *other* lands the proof will not do. The defendant must be acquitted.

But, gentlemen, if the specific act of cutting or removing is proved, the guilty—the unlawful intent—will be presumed. From an unlawful act an unlawful intent will be inferred. The statute declares the act criminal. Proof of the commission of the act raises the presumption of a guilty knowledge and a guilty intention. * * *

But this presumption may be rebutted by the evidence of circumstances showing a lawful intention. * * * An evil intent is an essential ingredient of every crime. And the statute does not contemplate the punishment of the innocent. An unlawful act with a lawful intention is not criminal.

* * * Understand this: The Government must prove two prominent facts—the *cutting and the premises where cut.* If such proof corresponds with the allegations of the indictment, and there is no explanatory proof rebutting an unlawful intention, your verdict must be guilty.

But otherwise, after such proof on the part of the Government, if the defendant clearly shows that a mistake was committed by the defendant himself, or by the hands under his direction, in regard to the lines of survey. * * *

* * * * * * *

Now, the United States, as a great land proprietor, is not inhibited the usual civil remedy allowed to and provided for all for any loss or injury sustained. The courts of justice are open to the civil actions of the Government as to those of an individual. But there is a vast difference in the rule of judgment between the civil action and the criminal verdict. In the former, the proof of the injury and its extent calls justly for the rendition of appropriate damages, and the plea of ignorance or mistake or an innocent intention availeth not. The injury is done; the ignorant trespasser must repair the loss. So with the Government. Its landed dominion is under the protection of the general law, independent of the statute of 1831. The action of trespass is an action to which the Government may resort, and under which it may recover damages to the full extent of the injury sustained.

And a conviction and punishment of a defendant for a trespass, under the act of 1831, would not protect, under a civil action, for the injury sustained. Neither would a judgment, on the latter remedy, be a sufficient plea of defense under the indictment.

* * * * * * *

The jury found a verdict of guilty.

United States *v.* Rafael Soto.

Supreme court, Territory of Arizona (64 Pac. Rep., 419).

1. Under R. S. U. S., 2461, declaring that any person who cuts live oak or red cedar trees "or other timber" on any lands of the United States with intent to use the same in any manner other than for the use of the United States Navy, shall be punished, etc., it was not intended to confine the protection to timber of size and kind adapted to house or ship building.
2. Under R. S. U. S., 2461, providing that any person who cuts any live oak or red cedar "or other timber" from any lands of the United States with intent to use the same in any manner other than for the use of the United States Navy shall be punished, etc., it was error to sustain a demurrer to an indictment charging defendant with cutting mesquite trees on the ground that the mesquite tree is not timber within the meaning of the statute, since some mesquite timber is fit material for some constructive uses; and therefore the question as to whether or not that cut by defendant was such "timber" was a question for the jury, and not to be decided on demurrer.

Opinion by Davis, *J.:* This is a criminal case, and the appeal is taken by the Government on a question of law alone which was decided adversely to the appellant in the court below. The prosecution was founded upon section 2461, R. S. U. S., which declares that "if any person shall cut, or cause or procure to be cut, or aid or assist or be employed in cutting, any live oak or red cedar trees or other timber on, or shall remove or cause or procure to be removed, or aid or assist or be employed in removing, any live oak or red cedar trees or other

timber from any * * * lands of the United States * * * with intent to export, dispose of, use, or employ the same in any manner whatsoever other than for the use of the Navy of the United States, every such person shall pay a fine of not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months." After the usual jurisdictional and necessary averments, the indictment charged "that the said Rafael Soto, within and upon the public unsurveyed lands of the United States, and upon the lands known and designated as the Camp McDowell Military Reservation, did unlawfully, willfully, and wrongfully cut, cause to be cut, remove and cause to be removed therefrom mesquite trees and mesquite timber, to wit, five hundred mesquite trees of the value of two hundred and fifty dollars lawful money of the United States, with the intent then and there to use and dispose of the same in a manner other than for the use of the United States Navy." The defendant demurred to the indictment on the ground that the facts stated did not constitute a public offense, relying upon the former adjudication of this court in Bustamente *v.* United States (42 Pac., 111), wherein it was distinctly held that "mesquite is not 'timber' within the meaning of said section 2461." The district court, following the authority of that decision, sustained the demurrer and ordered that judgment be entered dismissing said cause and discharging the defendant.

Counsel for the Government have brought this appeal upon the theory that there is manifest error in the ruling and judgment of the lower court, and that the correction thereof is important to the proper and uniform administration of the criminal law. We are asked to review the holding in Bustamente *v.* United States, supra, as that case involved the same questions which are here again presented for our consideration. These are:

1. Is mesquite timber or not within the meaning of section 2461, R. S. U. S.?

2. Can the question of whether mesquite is timber or not be properly determined upon demurrer to an indictment charging the unlawful cutting of mesquite on the public domain? The term "timber" in its earlier signification was applied chiefly to wood of the larger dimensions used in the building of houses and ships, but the general use of all kinds of forest trees for constructive purposes has given to the term a less restricted meaning. Webster defines "timber" to be "that sort of wood which is proper for buildings or for tools, utensils, furniture, carriages, fences, ships, and the like—usually said of felled trees, but sometimes of those standing." In this sense it would include all kinds of wood used either for building purposes or in the manufacture or construction of useful articles. The language of the section under which the indictment was drawn mentions particularly

live oak and red cedar trees, and then refers to other timber, showing conclusively that it was not the intention of Congress to confine the protection extended to any particular class or kind of trees, but to apply it in its most general sense. And this interpretation is in accord with the use of the word "timber" in other enactments of Congress at places where its obvious meaning absolutely precludes the idea that the term was intended to be confined to trees or wood of such kinds and sizes as would be especially adapted to house or ship building. (United States *v.* Stores, 14 Fed., 824.) It is to be observed that in Bustamente *v.* United States, supra, this court conceded to the term its broader signification, but upon what was assumed to be common knowledge proceeded to characterize the mesquite as "a brittle, knotty, skraggy, fiberless, gnarled wood that can only be used for firewood. It is used in the manufacture of no useful article. It only inhabits the desert. * * * Neither a ship carpenter, molder, cabinetmaker, last maker, carriage builder, nor any other kind of woodworker would include mesquite in their several classifications of timber." From which the court in that case reached the conclusion that Congress did not intend to include it in the term "timber" when it passed this law. And for the reason that mesquite was not timber, within the meaning of the law, it was ruled that the demurrer to the indictment should have been sustained. If the wood in question is accurately distinguished by the description given to it by the learned judge who wrote the prevailing opinion in the Bustamente case, and the characteristics therein mentioned are commonly known and recognized, then doubtless his conclusion is correct. But investigation into the various growths, character, and known uses of the mesquite tree will not, we believe, warrant the sharply defined limitation which the court from judicial knowledge has placed upon its utility. From the Century Dictionary we obtain the following definition:

MESQUITE. An important leguminous tree, or often shrub, Prosopis juliflora, growing from Texas to southern California, and thence southward to Chile. It reaches a height of 30 or 40 feet, but is often scrubby, forming dense clumps of chaparral. Under the action of prairie fires it is reduced to a low shrub, developing then an enormous mass of roots—locally known as underground forest—of great value as fuel. The wood is heavy and very hard, almost indestructible in contact with the ground; it is used for the beams and underpinnings of adobe houses, for posts and fencing, for fuel, and for furniture. It is of a brown or red color, handsome when polished, but difficult to work.

For the region of Arizona the mesquite, to a considerable extent, fulfills the functions of a forest tree. Although used chiefly for fuel, its value for constructive purposes has also been recognized, and the use of mesquite of larger growth in the construction of buildings and fences here is sufficiently common to make it a matter of general knowledge. We hold, therefore, that in prosecutions under the foregoing statute the question of whether or not mesquite is timber must

necessarily be one of fact, dependent upon the character of the wood charged and shown to have been cut or removed in each particular case, and that in the case at bar it was not a question which could properly be determined upon a demurrer to the indictment. This view leads to the disapproval of the law as declared in Bustamente *v.* United States, supra, and it also follows that there is error in the ruling and judgment of the lower court. But as that judgment in this case operates as a bar to another prosecution for the same offense the statute prevents its reversal.

LIABILITY.

CRIMINAL LIABILITY.

The penal act of March 2, 1831, 4 Stat., 472 (section 2461, U. S. R. S.), provides "for the punishment of offenses committed in cutting, destroying, or removing live oak and other timber or trees reserved for naval purposes."

This act of March 2, 1831, was fully considered in the case of The United States *v.* Ephraim Briggs (9 Howard, 351), in which the Supreme Court decided that the said act authorized the prosecution and punishment of all trespassers on public lands by cutting timber, whether such timber was fit for naval purposes or not.

The United States *v.* Ephraim Briggs.

(9 Howard, 351.)

On the 2d of March, 1831, Congress passed an act (4 Stat., 472), entitled "An act to provide for the punishment of offenses committed in cutting, destroying, or removing live oak or other timber or trees reserved for naval purposes."

The act itself declares that every person who shall remove, etc., any live oak or red cedar trees or other timber from any other lands of the United States shall be punished by fine and imprisonment.

The title of the act would indicate that timber removed for naval purposes was meant to be protected by this mode and none other. But the enacting clause is general, and therefore cutting and using of oak and hickory or any other description of timber trees from the public lands is indictable and punishable by fine and imprisonment.

See also decision in case of Forsyth *v.* United States (9 Howard, 571).

The United States *v.* Redy.

United States circuit court (5 McLean, 358).

Under the act of Congress, it is not necessary to describe, in an indictment for trespass on the public lands, every kind of timber that was cut.

It is sufficient to name one or more species and in the words of the statute allege other timbers.

An indictment will lie for cutting timber on any of the public lands, though it may not have been reserved for naval purposes.

OPINION OF THE COURT.

This is an indictment for cutting walnut and other trees on the public lands of the United States. It was objected that no other timber except what is named in the indictment can be proved. But the court held that, under the allegation of other timber, proof other than walnut trees was admissible to the jury.

An objection was also made, that an indictment would not lie for a trespass on the public lands unless such lands had been reserved for naval purposes. But the court ruled an indictment could be sustained, under the decisions, for the cutting of timber on the public lands which had not been reserved for naval purposes.

The court instructed the jury they must be satisfied that the person who cut the timber was employed by the defendant and that the timber was cut by his direction. If this be proved, the defendant is answerable, under the law, the same as if the defendant had in person committed the trespass.

The jury found the defendant not guilty.

UNITED STATES *v.* THOMPSON.

In the circuit court of the United States (6 McLean, 56).

Not necessary, in an indictment for cutting timber, to state the class of lands from which the trees were cut.

Such a description as shows the accused the offense with which he is charged is sufficient.

Where a statute creates an offense, and the indictment charges the same in the precise words of the statute, it is unnecessary to prefix to the charging words the word "unlawful," or any other word showing a wrongful intention.

UNITED STATES *v.* STONE.

District court, district of Idaho (49 Fed. Rep., 848).

PUBLIC LANDS—TIMBER TRESPASS.

Criminal proceedings may be maintained under section 2461, U. S. R. S., for a violation of its provisions; and it is sufficient to allege in the indictment that the cutting and removing of the timber was for use other than that of the Navy of the United States. It is not necessary to allege that defendant was not justified under any of the various land laws of the United States.

SAME.

Charging the "cutting and removing" of timber does not constitute the allegation of two offenses to one count.

TRESPASS THROUGH NEGLIGENCE.

In an action to recover a statutory penalty for the cutting of trees, defendant is liable for careless as well as willful cutting, and can not escape liability by showing that he turned his servants into an unenclosed lot, with instructions to cut only his trees, without approximately indicating to them the boundaries of his land. (United States Digest, Vol. XIV, 803; Keirn *v.* Warfield, 60 Miss., 799.)

SECTION 2461, U. S. R. S., NOT REPEALED BY THE ACTS OF JUNE 3, 1878 (20 STAT., 89), AND AUGUST 4, 1892 (27 STAT., 348).

See Commissioner of the General Land Office to the Secretary of the Interior, May 16, 1896, cited on page 105.

CRIMINAL LIABILITY FOR PUBLIC TIMBER TRESPASS CAN NOT BE COMPROMISED.

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF THE TREASURY,
Washington, D. C., March 3, 1884.

SIR: I have the honor to return herewith a communication addressed to you by the honorable Secretary of the Interior with its inclosures relating to the offer of W. S. Harrison to pay $50 in compromise of a criminal action pending in the northern judicial district of Florida, brought because of a trespass on the public lands.

The papers were referred to this office the 25th ultimo.

A criminal liability of this nature can not be compromised, and I have informed the United States attorney of this fact. * * *

Very respectfully,

J. H. ROBINSON,
Acting Solicitor of the Treasury.

Hon. CHARLES J. FOLGER,
Secretary of the Treasury.

CIVIL LIABILITY.

UNITED STATES ENTITLED TO CIVIL REMEDIES.

Attorney-General Wirt, in an opinion of the 27th of May, 1821, holds as follows:

> Independent of positive legislative provisions, I apprehend that, in relation to all property, real or personal, which the United States are authorized by the Constitution to hold, they have all the CIVIL remedies, whether for the prevention or redress of injuries, which individuals possess. (See 3 Wheaton, 181.) So the United States, being authorized to accept and to hold these lands for the common good, must have all the legal means of protecting the property thus confided to them that individuals enjoy in like cases. * * * They are, therefore, in my opinion, entitled to the injunction of waste by way of prevention, and to the action of trespass by way of punishment, in like manner as individuals, similarly situated, are entitled to them.

Attorney-General Taney, afterwards Chief Justice of the United States, in an opinion of 22d of August, 1833, cites this opinion of Mr. Wirt, and concurs in it.

UNITED STATES *v.* LEE.

(106 U. S., 222.)

* * * * * * *

Another consideration is that since the United States can not be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this court in the case of Carr *v.* United States, already referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights.

* * * * * * *

RIGHT TO PURSUE AND RECLAIM PROPERTY.

Justice demands, therefore, and the law concedes that the owner of personal property may pursue and reclaim the chattel wherever he can find and identify it. (Schouler's Personal Property, vol. 2, p. 21.)

COTTON *v.* UNITED STATES.

(11 Howard, 229.)

The United States have a right to bring an action of trespass *quare clausum fregit* against a person for cutting and carrying away trees from the public lands.

This case was brought up, by writ of error, from the district court of the United States for the northern district of Florida.

It was an action of trespass *quare clausum fregit* brought by the United States for cutting trees upon public lands, commenced in the superior court of West Florida in 1844, to which the defendant pleaded not guilty on the 26th of March, 1845. The cause remained pending in said court until the 15th of January, 1848, when, in pursuance of the act of the 22d February, 1847 (ch. 17, sec. 8), it was transferred to the United States district court for the northern district of Florida, and was ordered to stand for trial at the ensuing March term.

At that term the defendant appeared, and on leave filed a demurrer to the declaration, which, after argument, was overruled, and the cause set down for trial on the plea of not guilty.

The cause having come on, the defendant requested the court to charge the jury—

First. That the only remedy for the United States for cutting pine timber on the public lands was by indictment.

Second. That the United States have no common-law remedy for private wrongs.

Third. That the right of the United States to bring this action must

be derived either from an act of Congress or from the law of some State in which the contract was made by which it acquired the property on which this trespass is alleged to have been committed.

Fourth. These lands were acquired by treaty from Spain, and that the United States has no common-law remedy for trespass committed thereon; and that Congress not having authorized the exercise of this remedy the plaintiff ought not to recover any damages.

Which charge the court refused to give, whereupon the defendant excepted.

The jury found the defendant guilty of the trespass, and assessed the damages of the United States at $362.50, for which amount, and $122.22 costs, judgment was entered up. A motion in arrest of judgment was overruled.

The Supreme Court having at the last term decided that it had jurisdiction in cases like this under the act of the 27th of February, 1847, without reference to the amount in controversy, the case now came before the court on the points raised by the bill of exceptions. (9 How., 579.)

It was argued by Mr. Walker for the plaintiff in error and Mr. Crittenden (Attorney-General) for the United States.

Mr. CRITTENDEN. For the proper understanding of the points in the case, it is necessary to call the attention of the court to the act of the 2d of March, 1831 (4 Stat., 472), which was before it at the last term in the case of the United States *v.* Briggs (9 Howard, 351), in which it was decided that the cutting or procuring to be cut, removing or procuring to be removed, or aiding, or assisting, or being employed in the cutting of all descriptions of timber trees on the public lands, is an indictable offense under the said act and punishable by fine and imprisonment.

No defense arising out of the passing of this act was pleaded either by way of abatement or specially.

The United States have the same right as any other proprietor to sue for trespasses on the public lands, and that right is not merged or lost by such trespasses having been made an offense punishable by indictment under the act of 1831. (Dugan *v.* United States, 3 Wheat., 181; United States *v.* Gear, 3 Howard, 121; Manro *v.* Almeida, 10 Wheat., 494; Cross *v.* Guthrie, 2 Root, Con. R., 90; Smith *v.* Weaver, 1 Taylor, 58; Blassingame *v.* Glaves, 6 B. Monroe, 38; Foster *v.* The Commonwealth, 8 Watts and Serg., 77.)

Mr. Justice Grier delivered the opinion of the court:

This is an action of trespass *quare clausum fregit* brought by the United States against Loftin Cotton, in which he is charged with cutting and carrying away a large number of pine and juniper trees from the lands of plaintiff.

On the trial below, the counsel for defendant requested the court to instruct the jury: First, "that the only remedy for the United States

for cutting pine timber on the public lands was by indictment." Second, "that the United States have no common-law remedy for private wrongs." The refusal by the court to give these instructions is now alleged as error.

Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal. It is true that in consequence of the peculiar distribution of the powers of government between the State and the United States, offenses against the latter, as a sovereign, are those only which are defined by statute, while what are called common-law offenses are the subjects of punishment only by the States and Territories within whose jurisdiction they are committed. But the powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the Constitution upon their sovereign powers can not affect their civil rights. Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property in the State courts, or in their own tribunals administering the same laws. As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in Dugan *v.* United States (3 Wheat., 181), "it would be strange to deny them a right which is secured to every citizen of the United States." In the United States *v.* The Bank of the Metropolis (15 Peters, 392), it was decided that when the United States, by their authorized agents, become a party to negotiable paper, they have all the rights and incur all the responsibilities of other persons who are parties to such instruments. In the United States *v.* Gear (3 Howard, 120), the right of the United States to maintain an action of trespass for taking ore from their lead mines was not questioned.

Many trespasses are also public offenses by common law, or are made so by statute, but the punishment of the public offense is no bar to the remedy for the private injury. The fact, therefore, that the defendant in this case might have been punished by indictment as for a public offense is no defense against the present action. Whether, if he had actually been indicted and amerced for this trespass in a criminal prosecution in the name of the United States, such conviction and fine could be pleaded in a bar to a civil action by the same plaintiff, is a question not before us in this case, and is therefore not decided.

The judgment of the district court is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of Florida, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed, with damages at the rate of 6 per cent per annum.

LIABILITY OF PERSON CUTTING TIMBER FROM PUBLIC LAND SOLD TO HIM BY PUBLIC OFFICERS WITHOUT AUTHORITY.

MARY A. PHINNEY ET AL.

(28 L. D., 163.)

A purchaser erroneously allowed to buy "offered" timber land takes nothing thereby; and if he cuts timber from such land is liable in damages to the United States in a civil action, to the same extent as though the trespass had been committed upon any other part of the public domain.

* * * * * * *

Secretary Hitchcock to the Commissioner of the General Land Office, March 3, 1899.

December 24, 1896, Mary Phinney, and Francis J. Burns as the duly appointed administrator of the estate and guardian of the minor children of James F. Phinney, deceased, respectively, joined in the execution of a power of attorney making Harvey Spaulding & Sons their attorneys to collect and receive from the Government the purchase money, fees, and commissions, amounting to $310, paid by the said James F. Phinney April 1, 1884, under the timber and stone act, for the SW. ¼ of the SE. ¼ of sec. 20 and the W. ½ of the NE. ¼ of sec. 29, T. 33 N., R. 3 E., Olympia, Wash. January 29, 1897, said attorneys filed in your office a proper application for the repayment of said money, which was rejected. Appeal here.

James F. Phinney died June 22, 1891, and your office canceled his entry for said land, March 6, 1895, "because the land included therein was offered land, and hence not subject to entry under the act of June 3, 1878." This entry, being of offered lands, was erroneously allowed, and its confirmation was not authorized by law, since the timber and stone act of June 3, 1878 (20 Stat., 89), only authorized entries of unoffered lands. The cancellation thereof was, therefore, proper action.

Section 2 of the act of June 16, 1880 (21 Stat., 287), provides that, where from any cause an entry under the desert-land laws—

has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same,

upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

Your office denied said application, for the following reasons:

Special Agent C. E. Loomis was directed to make an inspection of this tract and report the condition of the timber thereon. On August 12, 1892, the special agent reported that Phinney had cut and removed about a million feet of timber from this land in 1884 and 1885. The fees and purchase money paid by Phinney on this entry amount to $310. This amount is deemed a partial set-off for the timber trespass committed by Phinney on this land.

This decision is complained of by the appellants, in substance, that it was error to hold that a trespass was committed by Phinney, though the truth of the statements made in said agent's report be conceded; error to hold that there is any evidence showing or tending to show that Phinney cut or removed a million feet of timber, or any portion of such timber, from this land, and error—

in holding that where it is plain an entry is erroneously allowed and can not be confirmed, and the entry is canceled for that reason, that the Government can, on a one-sided, partial, and unsubstantiated report of a special agent, without notice to the applicant, that at some time there has or may have been a cutting of the timber on the tract involved, avoid the repayment of the purchase money, as provided for in the act of June 16, 1880.

If the entryman, or any one for him, cut or removed timber from this land, he was, while living, and his estate is liable in trespass therefor. The officers of the Land Department, acting as the agents of the Government under special powers, exceeded their authority in making the sale of this land under the timber and stone act, and the purchaser took nothing by his purchase. He was therefore liable in damages, and his estate is now liable in damages to the United States, to the same extent as though the trespass had been committed on any other of the public lands of the United States. He was not liable to a criminal prosecution, because he was acting in good faith, believing that the timber belonged to him, but this is not a valid defense to a civil action.

ACQUITTAL IN CRIMINAL SUIT NO BAR TO SUIT TO RECOVER THE VALUE OF TIMBER.

STONE *v.* UNITED STATES.

Circuit court of appeals, ninth circuit (64 Fed. Rep., 667).

JUDGMENT—RES JUDICATA—ACQUITTAL OF CRIMINAL CHARGE.

An acquittal of a person indicted for unlawfully and feloniously cutting and removing timber from public lands in violation of Revised Statute, section 2461, is not a bar to an action by the United States against such person to recover the value of such timber as being wrongfully cut and converted. (Coffey *v.* U. S., 6 Sup. Ct., 437; 116 U. S., 442, distinguished.)

SAME—PROPER TEST.

A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first suit if it had been given therein.

STRUCTURES WRONGFULLY PLACED ON PUBLIC LAND.

The mere continuance of a structure tortiously erected upon another's land, even after satisfaction of a judgment for such erection, is a trespass for which another action of trespass *qu. cl. fr.* will lie. (United States Digest, Vol. VI, p. 758, 1875; Russell *v.* Brown, 63 Me., 203.)

MEASURE OF DAMAGES.

E. H. BLY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES, DEFENDANT IN ERROR; B. F. HARTLEY ET AL., PLAINTIFFS IN ERROR, *v.* THE UNITED STATES, DEFENDANT IN ERROR; THE UNITED STATES *v.* DAY ET AL. (INDICTMENT).

Circuit court, Minnesota (4 Dill., 464).

In certain civil and criminal actions by the United States against trespassers upon its unsold timber lands: *Held*, that the official plats and books in the office of the register of the United States Land Office are admissible as evidence on its behalf to show that the land on which the timber was cut had not been sold by the United States.

Parol evidence is not admissible on behalf of the defendants to show that the *locus in quo* was swamp land within the meaning of the swamp-land grant to the several States.

The cutting of timber upon the public lands is a criminal offense (Rev. Stat., sec. 2461), and the Government may proceed both civilly and criminally.

Where timber is cut upon the public lands willfully, fraudulently, or negligently, and without authority, and made into saw logs, the Government may replevy such logs, even when they have reached the boom, or, at its election, may sue in trover for their value, and in either case may recover without deduction for their enhanced value, after severance from the freehold, arising from the labor of the wrongdoer. In such case the Government is not confined to the "stumpage" value. (Nesbit *v.* St. Paul Lumber Company, 21 Minn., 491.)

Whether a different rule of damages would apply if the trespass were neither willful, fraudulent, nor negligent, *quære?*

CUTTING TIMBER UPON PUBLIC LANDS * * * —REMEDY OF GOVERNMENT—INDICTMENT—REPLEVIN—TROVER—MEASURE OF DAMAGES.

The Government has brought numerous civil suits in the nature of trover to recover the value of pine saw logs cut upon the public lands by the defendants or their vendors, and which, before the suits were commenced, had been rafted and brought down into the boom at Minneapolis, Brainerd, and other places. It has also caused the persons who

cut the timber to be indicted. Certain questions of law arising in these cases were argued and decided, as shown in the opinion of the court.

DILLON, *C. J.:*

* * * * * * *

3. The cutting of timber upon the public lands is made a crime by the legislation of Congress, which may be prosecuted by indictment (Rev. Stat., sec. 2461), notwithstanding the provisions of section 4751. And the Government may proceed against trespassers upon its land, civilly or criminally, or both at its election, and judgment in one form of remedy is no bar to the prosecution of the other remedy. The principle of the decision of Mr. Justice Miller in The United States *v.* McKee, ante, has no application to such a case.

It sues in these cases civilly, as the proprietor of the trees or timber which have been unlawfully cut and removed from its lands, to recover the value thereof. And it prosecutes the trespassers criminally in its sovereign capacity for a violation of its criminal statute in that behalf.

4. Where timber has been cut into logs upon the public lands by a person who knows that the land belongs to the Government, or who has no reasonable ground to believe that it belongs to him or to some one under whom he claims, and such logs are by him hauled to the water course and rafted and taken to a distant boom, by means of which labor of the wrongdoer their value is much enhanced beyond their value when first severed from the freehold, the Government may replevy such logs in the boom, or may maintain an action in the nature of trover for their value, and in either case may recover without deduction for the enhanced value which may have been given to the logs after the severance from the freehold by the labor of the wrongdoer. In such a case, the Government is not confined to what is called the "stumpage" value, but may recover the value of the logs in the boom.

As in such case the title of the Government to logs thus cut continues as against the wrongdoer and all persons (Town *v.* Dubois, 6 Wall., 548) until at least there has been some greater transformation of the original property than exists while it remains in the shape of logs, if the wrongdoer sells the logs to a person who has no actual notice that they were cut on the public lands, still the Government may maintain replevin against such vendee for the logs, if they are in existence, or if he has sawed them into lumber (which is a conversion of the logs), the Government may recover from him the value of such logs, when so manufactured into lumber, and is not confined to the "stumpage" value.

On the last proposition the authorities are conflicting, and we adopt and follow the decision of the supreme court of the State upon the point. (Nesbit *v.* St. Paul Lumber Company, 21 Minn., 491.)

The rule above laid down is the only one which will effectually protect the timber lands of the Government which are remote from settlements and in the wilderness. As against the willful or negligent trespasser the rule of damage indicated is not unjust, and as against his vendee it is perhaps the logical and necessary result of the property in the logs still remaining in the Government. At all events, it is the rule which has been approved by the supreme court of the State in the case before cited.

It may also be observed that the conclusions reached have a strong support in the adjudicated cases. (Silsbury *v.* McCoon, 3 Comst., 379; Riddle *v.* Driver, 12 Ala. (N. S.), 590; Betts *v.* Lee, 5 Johns., 348; Ellis *v.* Wire, 33 Ind., 127; Schulenberg *v.* Harriman, 2 Dillon, 398, 404.)

But there are cases which assert principles more or less in conflict with the cases just cited. (Moody *v.* Whitney, 38 Maine, 174; Single *v.* Schneider, 30 Wis., 570; Wetherbee *v.* Green, 22 Mich., 311—an instructive case.)

There is also a class of cases, English and American, which hold that where coal or mineral ore is taken by one person from the land of another the ordinary measure of damages in trespass or trover is the value of the coal or mineral when it first became a chattel, or was converted, and not the value of coal or ore in place, or as it lay in the earth. The principal cases on this subject are cited and commented on in Barton Coal Company *v.* Cox, 39 Md., 1, S. C.; 17 Am. Rep., 525; S. P. McLean Coal Company *v.* Long, Sup. Ct. Ill., Oct., 1876; *in re* United Merthyr Collieries Company, Law Rep., 15 Equity Cases, 46; S. C. 5 Eng. Rep. (Moak's ed.), 707.

The cases last referred to have generally arisen between adjoining owners, and the mitigated rule of damages which they lay down may have been adopted in consequence of the difficulty of ascertaining boundaries in subterranean mines, and it does not apply where the trespass is fraudulent or willful or negligent. At all events, the doctrine of these cases should not be extended to cases of willful or negligent trespasses upon the public timber lands of the Government.

If a private proprietor of timber lands used due precautions to ascertain his boundaries, and, by mistake of the surveyor, or without negligence or fault on his part or that of his servants, unintentionally cut on the adjoining lands of the Government, he, in good faith, supposing he was cutting on his own lands, and the Government neglected or delayed to bring trover until the logs thus cut were enhanced in value two or three hundredfold by the labor of bringing them to market, in such a case it may be that the court would be warranted in directing the jury to allow as damages the value of the logs when first severed, and interest on that value.

I am inclined to think the true doctrine of the measure of damages in trover is sufficiently flexible to allow this to be done when justice

requires no greater recovery; but the cases now before the court do not require a judgment on the point, and I leave it open for further consideration, should it arise.

Nelson, J., concurs. Judgment accordingly.

D. A. Dodge et al.

District court, Lewiston, Idaho, December term, 1886.

A preemptor who cuts or authorizes others to cut timber from his claim simply as a matter of converting the same into money, and not in good faith for the purpose of improving his claim and preparing it for cultivation, is a trespasser; if others purchase said timber they also are trespassers, and if they purchase knowing the facts they are willful trespassers. The fact that the United States afterwards patents said lands to other persons does not relieve those committing the trespass from their liability for their wrongful act in cutting the timber. (See Land Office Report for 1887, p. 479.) (See p. 180.)

United States *v.* James A. Smith.

District court, eastern Arkansas, April term, 1882.

In the case of the United States *v.* James A. Smith at the April term, 1882, of the United States district court for the eastern district of Arkansas, where it was charged that said Smith unlawfully cut and removed certain timber from lands belonging to the United States in the State of Arkansas and converted the same into cord wood and railroad ties, and where evidence was produced to show that he purchased said timber from parties who claimed to own the land upon which it stood, Judge Caldwell held as follows:

> Persons cutting and removing timber from lands are bound to know that they who assumed to sell them the timber had the right to do so, and if they did not, the purchaser is liable to the lawful owner of the timber for its value, and if the trees are worked up into cord wood or railroad ties, such cord wood and ties are the property of the owner of the land as much as the trees were, and the owner of the land is entitled to recover the value of the timber in its new form; in other words, the value of the cord wood and railroad ties.

In a case reported as involving purchase of public timber from a willful trespasser without reasonable inquiry on the part of the purchasers, suit ordered to recover the manufactured value of the logs, leaving it to the defendants to prove the innocence of their purchase, if such exists. (See letter from Attorney-General to the Secretary of the Interior, November 17, 1886, in the case of Spies and Martin, Michigan.)

The fact that the parties from whom purchase of public timber was

made were irresponsible parties does not relieve the purchaser from responsibility in the matter, it being a fundamental principle of common law that when a person purchases from an irresponsible party he is bound to take proper precautions to satisfy himself that said party had the right to dispose of the article in question. (See Land Office Report for 1887, p. 470.)

In the matter of the claim of "innocent" purchasers "without notice of wrong," the stringent and oft-enforced regulations of the Department respecting public timber constitute sufficient "notice" in respect to the necessity of taking due precautions not to infringe upon public timber. Carelessness or indifference on the part of speculators purchasing can not serve as a shield to ward off the consequence of their actions. (See Land Office Report for 1887, p. 474.)

In purchasing timber, ignorance of the facts attending the procuring of the same or mistaken belief that all was right is no sufficient defense for violating the statute which makes cutting and removing timber from public lands an offense irrespective of knowledge. (See Land Office Report for 1887, p. 473.)

EXEMPLARY DAMAGES.

The measure of damages for felling and carrying away trees from a tract of land is their value as they stood upon the land; and if their removal impaired the value of the land damages may be had for such injury. (United States Digest, Vol. IX, p. 201 (1872); Ensley *v.* Nashville, 58 Tenn., 144.)

Punitive damages may be recovered in a civil action for a wrongful act, notwithstanding the act constitutes an offense punishable under the criminal statutes. (United States Digest, Vol. VII, p. 230 (1875); Ward *v.* Ward, 41 Iowa, 686.)

The public good in the restraint of others from wrongful doing, as well as the punishment of the offender, is to be considered in estimating exemplary damages. (Ib.)

Exemplary damages are not recoverable as matter of right. In awarding them the jury must be governed by the malice or wantonness of the defendant as shown by the conduct they find him liable for. (United States Digest, Vol. VII, p. 231 (1875); Boardman *v.* Goldsmith, 48 Vt., 403.)

Where willfulness, fraud, malice, or oppression, evincing a disregard for the rights of others, characterize the wrongful act complained of, the jury are not limited in their verdict to the mere value of the property and interest, but may rightfully consider the circumstances of aggravation and increase the damages, so as to enforce a respect for the rights of others and as a punishment to the willful trespasser. (United States Digest, Vol. VIII, p. 223 (1875); Storm *v.* Green, 51 Miss., 103.)

Where there is evidence from which the jury may find defendant acted maliciously in committing a trespass, they may give plaintiff punitive damages. (United States Digest, Vol. XIII, p. 874; Smith *v.* Thompson, 55 Md., 5, S. C.; 39 Am. Rep., 409.)

The rule allowing exemplary or punitive damages applies where the wrongful acts of defendant are within the law for the punishment of crimes. (United States Digest, Vol. XIII, p. 244; Boetcher *v.* Staples, 27 Minn., 308, S. C.; 38 Am. Rep., 295.)

Willis and Wife *v.* Miller, Treasurer, etc., and others.

Circuit court, eastern district of Virginia, October, 1886 (29 Fed. Rep., 238).

Damages. * * * Malice.

Malice in law is not necessarily personal hate or ill will of the trespasser toward the person injured, but it is that state of mind which is reckless of law and of the legal rights of the citizens; and the object of exemplary damages or "smart money" is not only to indemnify the sufferer for any loss sustained, but to prevent similar actions on the part of the trespasser in the future.

Barry *v.* Edmunds.

(116 U. S., 550.)

It is settled in this court that in an action for a trespass accompanied with malice, the plaintiff may recover exemplary damages in excess of the amount of his injuries if the *ad damnum* is properly laid.

United States *v.* Taylor.

Circuit court, southern district of Alabama (35 Fed. Rep., 484.)

Public Lands—Trespass—Right of Government to Sue—Possession—Homestead.

Possession by a homestead claimant, and a receiver's receipt issued since bringing the action, do not divest the Government of possession or title so that it can not maintain an action of trespass for cutting timber on the land.

* * * * * * *

Same—Nominal Damages.

In such a case, merely entering on the land and cutting boxes or chipping trees, and removing therefrom crude turpentine, entitles plaintiff to nominal damages, though no actual damages were done.

Same—Compensatory Damages.

In an action for cutting growing trees, if their value can be ascertained without reference to the value of the soil on which they stand, the measure of damages is the injury done them and not the difference in the value of the land before and after such injury.

Same—Exemplary Damages.

In such a case the Government is entitled to exemplary damages, if the going on the land and cutting and chipping the trees, or dipping and removing the turpentine, was done by defendant willfully, or if such acts were the result of a negligence so gross as to show willfulness or a reckless indifference to the rights of the Government.

Woodenware Company *v.* United States.

(106 U. S., 432.)

Error to the circuit court of the United States for the eastern district of Wisconsin.

Where the plaintiff, in an action for timber cut and carried away from his land, recovers damages, the rule for assessing them against the defendant is:

1. Where he is a willful trespasser, the full value of the property at the time and place of demand, or of suit brought, with no deduction for his labor and expense.
2. Where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value.
3. Where he is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase.

The facts are stated in the opinion of the court.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error, founded on a certificate of division of opinion between the judges of the circuit court.

The facts, as certified, out of which this difference of opinion arose appear in an action in the nature of trover, brought by the United States for the value of 242 cords of ash timber, or wood suitable for manufacturing purposes, cut and removed from that part of the public lands known as the reservation of the Oneida tribe of Indians, in the State of Wisconsin. This timber was knowingly and wrongfully taken from the land by Indians, and carried by them some distance to the town of Depere, and there sold to the E. E. Bolles Woodenware Company, the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase.

The timber on the ground, after it was felled, was worth 25 cents per cord, or $60.71 for the whole, and at the town of Depere, where defendant bought and received it, $3.50 per cord, or $850 for the whole quantity. The question on which the judges divided was whether the liability of the defendant should be measured by the first or the last of these valuations.

It was the opinion of the circuit judge that the latter was the proper rule of damages, and judgment was rendered against the defendant for that sum.

We can not follow counsel for the plaintiff in error through the examination of all the cases, both in England and in this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a willful trespass, the rule of damages is the value of the coal as it was in the

mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine. (Martin *v.* Porter, 5 M. & W., 351; Morgan *v.* Powell, 3 Ad. & E. n. s., 278; Wood *v.* Morewood, 3 id., 440; Hilton *v.* Woods, Law Rep., 4 Eq., 432; Jegon *v.* Vivian, Law Rep., 6 Ch. App., 742.)

The doctrine of the English courts on this subject is probably as well stated by Lord Hatherly in the House of Lords, in the case of Livingstone *v.* Rawyards Coal Company (5 App. Cas., 25), as anywhere else. He said: "There is no doubt that if a man furtively and in bad faith robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement." But "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which can not be restored to him in specie."

There seems to us to be no doubt that in the case of a willful trespass the rule as stated above is the law of damages both in England and in this country, though in some of the State courts the milder rule has been applied even in this class of cases. Such are some that are cited from Wisconsin. (Weymouth *v.* Chicago and Northwestern Railway Company, 17 Wis., 550; Single *v.* Schneider, 24 id., 299.)

On the other hand, the weight of authority in this country, as well as in England, favors the doctrine that where the trespass is the result of inadvertence or mistake and the wrong was not intentional, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant he should be credited with this addition.

Winchester *v.* Craig (33 Mich., 205) contains a full examination of the authorities on the point. (Heard *v.* James, 49 Miss., 236; Baker *v.* Wheeler, 8 Wend. (N. Y.), 505; Baldwin *v.* Porter, 12 Conn., 484.)

While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class, where a purchaser from him is sued, as in this case, for the conversion of the property to his own use. In such case, if the first taker of the property were guilty of no willful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the willful wrong of the party who committed the trespass, he was liable under the rule we have supposed to be established for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant, who purchased it then with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued.

It seems to us that he must. The timber at all stages of the conversion was the property of the plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in anyone to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of caveat emptor applies, and hence the right of recovery in plaintiff.

On what ground, then, can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in the case of the inadvertent trespasser.

But here he has added nothing to its value. He acquired possession of property in the United States at Depere, which at that place and in its then condition is worth $850, and he wants to satisfy the claim of the Government by the payment of $60. He founds his right to do this, not on the ground that anything he has added to the property has increased its value by the amount of the difference between these two sums, but on the proposition that in purchasing the property he purchased of the wrongdoer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional tresspasser, such right existed, of course defendant would have bought it and stood in his shoes; but as in the present case, of an intentional tresspasser, who had no such right to sell, the defendant could purchase none.

Such is the distinction taken in the Roman law as stated in the Institutes of Justinian. (Lib. 11, Tit. 1, sec. 34.)

After speaking of a painting by one man on the tablet of another,

and holding it to be absurd that the work of an Appelles or Parrhasius should go without compensation to the owner of a worthless tablet, if the painter had possession fairly, he says, as translated by Dr. Cooper:

> But if he or any other shall have taken away the tablet feloniously, it is evident the owner may prosecute by action of theft.

The case of Nesbitt *v.* St. Paul Lumber Company (21 Minn., 491) is directly in point here. The supreme court of Minnesota says:

> The defendant claims that because they (the logs) were enhanced in value by the labor of the original wrongdoer in cutting them and the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value; that is, that he is not entitled to recover the full value at the time and place of conversion.

That was a case, like this, where the defendant was the innocent purchaser of the logs from the willful wrongdoer, and where, as in this case, the transportation of them to a market was the largest item in their value at the time of conversion by defendant; but the court overruled the proposition and affirmed a judgment for the value at Anoka, the place of sale.

To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the Government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who by fencing and vigilant attention can protect his valuable trees, the Government has no adequate defense against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural, and other specified uses has been used to screen the lawless depredator who destroys and sells for profit.

To hold that when the Government finds its own property in hands but one remove from these willful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrongdoer by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual and profitable.

We concur with the circuit judge in this case, and the judgment of the circuit court is affirmed.

Cases applying this rule of damages will be found in U. S. *v.* Williams, 18 Fed. Rep., 478; U. S. *v.* Heilner, 26 Fed. Rep., 82; U. S. *v.* Ordway, 30 Fed. Rep., 31; Aurora Hill, etc., Mine Co. *v.* Eighty-five Mine Co., 34 Fed. Rep., 521; Murphy *v.* Dunham, 38 Fed. Rep., 511; U. S. *v.* Scott, 39 Fed. Rep., 901; U. S. *v.* Wingate, 44 Fed. Rep., 129.

INSTRUCTIONS RELATIVE TO MEASURE OF DAMAGES.

The following circular relative to the rule of damages to be applied in cases of public timber trespass is based on the above decision in the case of Wooden-Ware Company *v.* United States (106 U. S., 432):

CIRCULAR.

(1 L. D., 695.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 1, 1883.

Special timber agents, General Land Office.

GENTLEMEN: Respecting the measure of damages to which the Government is entitled in settlement for timber trespass upon the public domain, the United States Supreme Court has recently decided that—

1. Where the trespasser is a knowing and willful one, the full value of the property at the time and place of demand, with no deduction for labor and expense of the defendant, is the proper rule of damages.

2. Where the trespasser is an unintentional or mistaken one, or an innocent purchaser from such a trespasser, the value of the timber at the time when first taken by the trespasser, or if it has been converted into other material, its then value, less what the labor and expense of the trespasser and his vendee have added to its value, is the proper rule of damages.

3. Where a person or corporation is a purchaser without notice of wrong from a willful trespasser, the value at the time of purchase should be the measure of damages.

You will, therefore, in cases where settlement is contemplated, state the facts and circumstances attending the cutting and the purchase of the timber in such clear and definite manner that the Supreme Court decision above referred to can be readily applied.

In cases where settlement with an innocent purchaser of timber cut unintentionally, through inadvertence or mistake, is contemplated, you are instructed to report as nearly as possible the damage to the Government as measured by the value of the timber before cutting.

Very respectfully,

N. C. MCFARLAND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
March 1, 1883.

Approved.

H. M. TELLER,
Secretary.

Isadore Cohn.

(20 L. D., 238.)

In the settlement of an unintentional timber trespass the value of the timber at the time of its taking, or if it has been converted into another form, its then value, less what the labor and expense of the trespasser have added thereto, is the proper rule of damages.

The fact that the trespasser in such case, in order to avoid prosecution, has offered a larger sum in settlement of the trespass than that required under the rule adopted by the Department is no reason why he should be held to such proposition, where it does not appear that he was acquainted with said rule. The sum incident to the survey of the land, under direction of the agent, together with the sum found to be due for the timber taken, is the amount he should be required to pay.

It is not an act of trespass for a homesteader to remove timber from his land in the preparation of the same for cultivation, nor should his vendee be held liable on a proposition of settlement therefor.

United States *v.* Mock.

Error to the circuit court of the United States for the northern district of California (149 U. S., 273).

When the defendant in an action of trespass brought by the United States against him for cutting and carrying away timber from public lands admits the doing of those acts, the plaintiffs are entitled to at least nominal damages in the absence of direct evidence as to the value of the standing trees.

It is not to be presumed in such case as matter of course that the Government permitted the trespass, and any instruction by the court pointing that way is error.

This action was commenced by the filing of a complaint on May 6, 1884, in the circuit court of the United States for the northern district of California, in which complaint it was alleged that the plaintiff was the owner, in 1879, of a certain tract of land in the county of Fresno, State of California, describing it, upon which tract of land were growing trees; that during that year the defendant unlawfully and wrongfully cut down and carried off certain of these trees, to wit, 500 pine trees, and manufactured them into lumber, producing 1,500,000 feet of lumber, of the value of $15,000, for which sum judgment was asked. Defendant answered with a general denial.

The case was tried before a jury in April, 1888. On the trial it appeared from the testimony of defendant, as well as that of other witnesses, that in 1879 defendant had built a sawmill adjoining the tract and operated it for a little less than three months; that it had a capacity of about 10,000 feet, board measure, a day; that he had five white men and two or three Indians employed at the mill; that the timber was cut in the vicinity of the mill. The defendant also admitted that he knew that the tract described in the complaint was Government land, and that he did not at any time enter it as a homestead or preemption, and that a portion, though only a small portion, of the timber which

he sawed was cut from that tract. There was the further testimony on the part of the Government of two timber agents, that after the commencement of this action they went upon the land and counted the number of stumps, and found 814 stumps of pine trees of the diameter of from 2 to 3 feet. There was also given in evidence an estimate of the amount of lumber that would be made from a tree of the size indicated by such stumps. There was evidence tending to show the price and value of lumber in that vicinity in the year 1879, but not the value of standing trees. In its instructions the court referred to the estimate made by the timber agents of the amount of lumber that would have been manufactured from the timber cut upon the premises, and the admission made by the defendant that he had cut some timber, stated that there was no testimony that he had cut all the timber that had been cut thereon, and that the jury had no right to guess, and that unless proof had been offered which created a reasonable certainty in their minds as to the amount of timber cut by the defendant and its value, the verdict must be for the defendant, and then proceeded as follows:

There are two elements entering into these cases. This is an action of trespass, a tort. It is wrong for one person to go on another person's land and cut and remove timber without the consent of the owner; so the going of any person on the public domain and cutting and removing from it timber without the consent of the Government is wrong, just as much as if I went on any of your ranches or vineyards, cut and removed the crops without your consent. But there is a vast difference in the character and quality of actions. A gentleman may permit the public to use a portion of his domain as a highway for years, and as long as it is being done with his tacit consent nobody would be held a trespasser for doing so; but when he notifies the public that it must cease then that tacit right ceases, and anybody who went on there might be justly held as a trespasser. The history of the country in regard to trespassing on the public domain and cutting timber for the use of the people in building their homes upon their farms and for general domestic purposes may be considered. As I observed, the Government is the proprietor of the soil. It has always owned the soil and the timber on it and the mines beneath it; but it is a matter of common knowledge in this country that the country could not have been settled up otherwise than by the practice and custom which has grown up in advance of legislation.

It is a matter of history that the Government permitted the early pioneers as they went ahead to make their homes for themselves to go on the public domain and take such timber as was necessary for domestic use, and although there never was any law or license to that effect, it was done with the knowledge of every department of the Government—legislative, judicial, and executive. The earliest law that was passed that I remember was in 1831, forbidding, under pains and penalties, the entering on lands that had been reserved on which there were valuable forests of live oak and pine for shipbuilding. It is possible that there was other legislation following that, but I do not remember any until 1878, and during all that time every department of the Government knew how the country was being settled, and that men went on and felled trees with this tacit permission, or, if there was not a tacit permission, at least there was no reprehension of their acts. In this case, in order to judge wisely and fairly of this defendant, as to whether he was a wanton trespasser, you will have to take into consideration the concurrent circumstances surrounding his acts. While

I wish you to understand that I am not aware of any license having ever been given in the last sixty years to any party to go on the public domain and cut timber, no court has ever held, and no court would be justified in holding, that these men were all criminals who went on and put up a little mill for the purpose of aiding their neighbors in procuring lumber for domestic purposes. I say you will not judge correctly whether these men were willful and wanton trespassers in the sense in which a trespass is willful and wanton unless you take into account the contemporaneous history of the country and these matters, which are familiar to you all. If this party was a willful trespasser, and cut from the public domain this timber wantonly and maliciously, the Government is entitled to recover from him the full value of the timber by him so cut and removed from the public domain, without allowing at all for the increased value that he put upon it; for it will not be permitted that a man shall trespass on your property and commit waste and wanton destruction by removing it, that you shall be merely indemnified for the original value; in other words, you may recover your property and its value wherever you find it, whether the man has added to its value since he got it or not. This case is somewhat different from the case yesterday. This case presents this naked fact: That if you return a verdict for the Government, it must be for the value of the lumber manufactured. Now, no evidence had been offered in the case showing the market value of the trees or if they had any market value one way or the other. There is no evidence in the case to warrant you in concluding that the trees had any market value in 1879 or at any other time. The only evidence offered by the Government is as to the value of the timber after it was cut and made into lumber, and in that way this case differs from the case yesterday. Yesterday I instructed you in that case that if you find that although there was a trespass, that it was not willful, you might determine the value of the timber as it stood on the ground. In this case there is no evidence of that kind.

The jury found a verdict for the defendant, and the Government has brought the case here on error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court:

The only errors alleged are in the charge. The specific portions to which the attention of the court was called at the time and exceptions taken are that which refers to the history of the attitude of the Government toward pioneers and others who took timber from Government lands for domestic use and that which declared that no verdict could be returned in favor of the Government except for the value of the lumber manufactured. In these there was obvious error. Although there was no direct evidence of the value of the standing trees, yet it did appear that they were manufactured into lumber and that the lumber had commanded a price of from $8 to $9 a thousand feet, and when the Government proved or defendant admitted that he cut and carried away some of the timber on this tract the Government was entitled to at least a verdict for nominal damages. As to any further right of recovery, see Wooden Ware Company *v.* United States, 106 U. S., 432; Benson Mining Company *v.* Alta Mining Company, 145 U. S., 428.

Nor were the observations of the court in reference to the attitude of the Government justifiable. Whatever propriety there might be

in such a reference in a case in which it appeared that the defendant had simply cut timber for his own use, or the improvement of his own land, or development of his own mine (and in respect to that matter, as it is not before us, we express no opinion), there certainly was none in suggesting that the attitude of the Government upheld or countenanced a party in going into the business of cutting and carrying off the timber from Government land, manufacturing it into lumber, and selling it for a profit; and that was this case. There is no pretense that the defendant cut timber for his own use; he says himself he sold it all. He ran a sawmill, cut timber, manufactured it into lumber, and made profit out of the sale of the lumber. There is nothing in the legislation of Congress or the history of the Government which carries with it an approval of such appropriations of Government property as that.

The judgment must be reversed and a new trial ordered.

See also United States *v.* Humphries, 149 U. S., 277.

Berry *v.* Fletcher et al.

Circuit court, western district of Missouri (1 Dill., 67).

All who instigate, promote, or cooperate in the commission of a trespass, or aid, abet, or encourage its commission, are guilty.

* * * * * * *

Where the defendants are sued jointly in trespass, the jury must find a single verdict, and assess damages jointly against such as are proved guilty of the *same* trespass.

In trespass against several, the jury should estimate damages according to the most culpable of the joint trespassers.

All damages are referred by the law either to compensation or punishment. Compensation is to make the party injured whole. Exemplary damages are given, not to compensate the plaintiff, but to punish the defendant.

United States *v.* Baxter et al.

Circuit court, district of Washington, northern division (46 Fed. Rep., 350).

* * * * * * *

Trespass—Burden of Proof—Damages.

In an action of trespass by the United States for cutting timber on Government land, the burden of showing that the timber was cut by mistake, with a view of mitigating the damages, is upon the defendants; and in the absence of evidence to that effect, there is no error in permitting the Government to recover the value of the saw logs when already brought to the water.

Trespass—Partnership.

Where such a trespass is committed by a firm, one partner can not show that as to him it was done through mistake, though his partner may not have been mistaken, and ask that one judgment for damages be rendered against him and a different one against his partner, since his holding the fruits of the tort after being notified of the mistake is a ratification of his partner's act.

UNITED STATES *v.* ECCLES ET AL.

Circuit court, district of Utah (111 Fed. Rep., 490).

* * * * * * *

MEASURE OF DAMAGES.

Defendants, who unlawfully cut and removed timber from public lands, but believing, in good faith, that they had the lawful right to cut the same, although negligent, are liable only for its value as it stood in the trees.

JOINT TRESPASSERS.

LOVEJOY *v.* MURRAY.

(3 Wall., 1.)

* * * * * * *

A judgment against one joint trespasser is no bar to a suit against another for the same trespass. Nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar.

AMERICAN BELL TELEPHONE CO. *v.* ALBRIGHT.

Circuit court, district of New Jersey (32 Fed. Rep., 287).

JUDGMENT—JOINT TRESPASSER—BAR OF RECOVERY.

A judgment against one joint trespasser or wrongdoer, without satisfaction, is no bar to a recovery against the others.

In event of willful trespass committed by one member of a firm his copartners are responsible for his acts on behalf of the firm from which they receive the benefits or profits. (See Land Office Report for 1887, p. 473.)

ENFORCING JUDGMENT.

DEPARTMENT OF JUSTICE,
Washington, January 21, 1887.

SIR: I am in receipt of your letter of December 21, with its inclosures, relative to timber trespass by R. D. Byrne and J. McDavid, doing business at Bluffsprings, Fla., up to 1884.

Pursuant to your request the United States attorney for northern Florida has been instructed * * * to bring civil suit for the manufactured value of the lumber, with a view to enforcing judgment against the defendants whenever the opportunity is afforded by their probable accumulation of property hereafter. * * *

Very respectfully,

A. H. GARLAND,
Attorney-General.

THE SECRETARY OF THE INTERIOR.

SETTLEMENT IN CASES OF PUBLIC TIMBER TRESPASS.

COMPROMISE.

(Sec. 3469, U. S. R. S.)

Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws.

DISTINCTION BETWEEN SETTLEMENT AND COMPROMISE.

(5 L. D., 240.)

A claim of the Government arising from timber depredations is for an unascertained amount which the Secretary of the Interior may properly find and determine and effect settlement for with the trespasser by receiving payment in full.

The amount of such a claim having been duly ascertained and fixed, there is no authority in the Department to compromise the same by receiving in payment therefor a less sum than the amount found to be due.

Secretary Lamar to the Secretary of the Treasury, November 15, 1886.

I am in receipt of a communication from the Solicitor of the Treasury of May 13, 1886, relating to the question of the authority of this Department to compromise and settle timber depredation cases, referring to the opinion of the Attorney-General submitted January 8, 1880, upon this subject.

In his communication (with reference to this opinion) the Solicitor of the Treasury says: "I am informed that since the date of this letter from the Attorney-General, a copy of which was furnished your Department about the time it was received, all applications for compromise of claims in favor of the United States arising from trespasses have been considered and disposed of as provided for in section 3469, Revised Statutes" (excepting certain cases therein referred to). Then referring to the regulations issued by the Commissioner of the General Land Office authorizing special agents to receive and consider propositions to settle claims in favor of the United States arising from trespass where the same were not willfully committed, says: "I know of no authority by which an executive officer can compromise and settle a claim in favor of the United States, except that conferred by sections 295, 409, 3229, and 3469, Revised Statutes." He brings the subject to my attention with a view of securing some uniform action. To this end I submitted the communication to the Commis-

sioner of the General Land Office for report, which is now before me, a copy of which I also transmit herewith.

The Commissioner of the General Land Office, doubting the authority of that office or of this Department to settle and compromise such cases, recommends that the practice heretofore followed of entertaining propositions in that office and this Department for settlement of timber trespasses be discontinued.

While I concur fully in the opinion of the Solicitor of the Treasury that there is no authority by which an executive officer can compromise a claim in favor of the United States, except that conferred by section 3469, I do not consider said section as a restriction upon the authority of any executive officer to settle a claim in favor of the United States where such settlement is not the result of a compromise, but a settlement in full payment of the entire amount due the Government on such claim and where such settlement is made by the Department having control and jurisdiction of the subject-matter.

The authority conferred by section 3469 is alone necessary to be considered in the investigation of this subject. That section provides that "upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim and the terms upon which the same may be *compromised*, and recommending that it be *compromised* upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to *compromise* such claim accordingly. But the provision of this section shall not apply to any claim arising under the postal laws."

After a careful consideration of the question of authority of an executive officer to compromise a claim in favor of the United States, except as provided for by the section above quoted, and of the character of claims arising from timber depredations and the authority to settle the same as exercised by this Department, I have been unable to concur with the views of the Solicitor of the Treasury or the recommendation of the Commissioner of the General Land Office that no proposition for the settlement of timber depredation claims should in the future be entertained by this Department, or that the settlement of such claims effected through it is the exercise of a doubtful authority.

It seems to me apparent that the difference of opinion as to the authority of this Department to settle timber depredation claims arises from the use of the words "compromise" and "settlement" in the same sense, or else the impression must prevail that the settlement of such claim, as now authorized and executed by this Department, is a settlement made upon a compromise of a specific amount found to be due.

Speaking of the regulations issued by the Commissioner and addressed to special agents, the Solicitor of the Treasury says that such regulations "contemplate that they may receive and consider propositions to

settle claims in favor of the United States arising from trespass where the same were not willfully committed," and adds: "I know of no authority by which an executive officer can compromise and settle a claim in favor of the United States except that conferred by sections 295, 409, 3229, and 3469, Revised Statutes." If it is intended by this that no authority exists in this Department to settle a claim upon a compromise of the amount found to be due, I concur in that view; but if it is intended that there is no authority in this Department to ascertain and determine what amount is due, and to settle such claim by receiving the full amount so found to be due, I do not concur.

A compromise implies a mutual concession or an agreement to receive in payment a less sum than the amount found to be due, and it is in this sense that the term is employed in section 3469. I do not understand that the settlement of such claims as authorized by this Department is a settlement of that character.

The general power and authority conferred upon this Department respecting public lands includes the duty and authority to protect from depredation the timber thereon, and to seize what is cut and taken away from them wherever it may be found. It follows that in the exercise of that power and duty this Department has full authority to ascertain and determine under the law the extent of such depredation, the value of the timber cut and destroyed, the character of the trespass, and when the amount of the claim has been ascertained to receive payment of the full amount of such claim in satisfaction thereof. (Wells *v.* Nickles, 104 U. S., 447; Wooden Ware Company *v.* United States, 106 U. S., 432.)

In the execution of this power and duty special agents have been appointed, who are directed to investigate and report upon all cases of timber trespass, and to receive propositions for settlement of the same. The instructions issued to special agents require the trespasser to submit with his proposition for settlement a sworn statement showing the character of the trespass, the amount of the timber, its value when standing in the tree, when felled and cut into logs, when delivered at the landing, when delivered at the mill, when manufactured into lumber, and its value in its position and condition when purchased by the party in whose possession it was found.

In respect to the character of the trespass, the Supreme Court, in the case of Wooden Ware Company *v.* The United States, *supra*, have announced certain rules which have been embraced in the instructions to special agents. Under the sworn statement so furnished, and the rules adopted for their guidance, the special agents investigate and report upon the claim, by which means the amount due the Government is officially ascertained and determined. A claim due the Government arising from timber depredations is a claim for an unascertained amount, which the Secretary of the Interior, through the

officers and agents of this Department, finds and determines. A settlement made with the trespasser by receiving payment of the amount so found to be due is in no sense a compromise, but payment in full of the claim due to the Government; and I can see no reason for invoking the action of the judicial department to ascertain and determine that which the executive department in the scope of its authority has already determined, or to enforce payment by suit when the trespasser offers to discharge his liability without suit.

The special agents may report the character of the trespass, the amount and the value, or either of these facts, different from that shown by the sworn statement of the trespasser; as, for instance, the trespasser may claim that he is an innocent purchaser from an unintentional trespasser, and may offer to pay the value of the timber at the time when taken. The special agent may report that the trespass was willful, of which the purchaser had notice, and may recommend settlement at the full value of the property at the time and place of demand. Upon further investigation by the special agent or upon examination by the Commissioner or the Secretary, it may be determined that the purchase was made without notice of wrong, but from a willful trespasser, and that the timber should be settled for at the value of the property at the time of purchase, to which the trespasser may agree and settle. While the amount paid may be greater than the amount originally offered and less than the amount originally reported by the Government officials, it is not a compromise of the claim, but a determination from the facts of the case of the amount due the Government.

If after that amount has been ascertained the trespasser either declines to pay or is unable to pay it, but offers a less amount, there is no authority in this Department to compromise the claim, but the future control of the case should be left with the Department of Justice.

This question was incidentally passed upon by the Solicitor-General, acting as Attorney-General, in his letter of August 23 last, addressed to this Department, relative to the seizure of timber taken from the public lands, from which I infer that the Department of Justice concurs in the view herein expressed; but as this question was not directly involved in the matter referred to I do not feel at liberty to claim it as authority for this opinion.

Being satisfied that this Department not only has authority, but that it is its duty to take jurisdiction of and to settle all such cases in the manner herein stated, I have for this reason so fully presented the matter for your consideration, with the request that if you should not agree in this opinion you will concur in submitting the matter to the Attorney-General for his opinion thereon.

SETTLEMENT—CRIMINAL LIABILITY.

A proposition of settlement submitted with the understanding that, if accepted, criminal proceedings for the trespass will be waived, will be rejected.

Secretary Hitchcock to the Commissioner of the General Land Office, October 23, 1900.

By your office letter "P" of the 4th instant, signed by the Acting Commissioner, there was submitted for my consideration the report, with accompanying papers, of Special Agent H. H. Schwartz, of your office, relative to a timber trespass committed upon certain described lands in Minnesota by the C. A. Smith Lumber Company, a corporation of that State. The timber, amounting in the aggregate to over 200,000 feet of white and Norway pine, was cut under contract with the administratrix of the estate of George A. Barclay, and the aggregate value of the timber in the position and condition where found is shown to be $1,702.70.

The C. A. Smith Lumber Company, through its vice-president, has offered to settle its liability by paying the full value of the timber as stated.

Without repeating all the facts set forth in your letter and the special agent's report, it is sufficient to say that the special agent states the trespass to have been willfully committed, either by one Craig (who was the agent of said company) to make a showing for the company, or else by instructions from the company. The special agent, however, recommends, in view of all the facts in the case—and you concur therein—that the proposition of settlement be accepted. The ground upon which the special agent bases his recommendation is that criminal conviction could not be obtained in this case against either Craig or C. A. Smith. Craig, in his judgment, could not be convicted, because he would show that he was working by the month and that there was no inducement for him to commit a trespass; that the C. A. Smith Lumber Company is one of the largest lumber concerns in the State, and that a man with the wealth and social and political influence of Smith could not be convicted.

Attached to his formal report in the case is a letter from Special Agent Schwartz to you, in which he discusses at some length what, in his judgment, should be the policy of the Department in dealing with cases of this character, and your office letter calls my special attention to, and requests my special consideration of, that letter.

The substance of the special agent's letter is that where a trespass is committed and where, in the judgment of the agent, after investigation, a criminal conviction can not be obtained, and an offer is made to settle for the full value of the timber, that such propositions should be accepted and criminal prosecution waived. He, of course, does not

recommend that such a rule should be promulgated by the Department, but rather that the principle should find expression in the practice thereof.

He urges that it will be practically impossible for an agent to obtain from a trespasser a proposition to pay the full value of the timber if he can not be practically assured that no criminal prosecution will follow, because such a proposition would be a tacit admission on the part of the trespasser of criminal liability. He also says that it is a comparatively easy matter to obtain a proposition from a trespasser to pay the stumpage value of the timber, because that furnishes him an easy manner of purchasing Government timber; but that when trespassers are made to know that they will be required to pay the full value of the timber whenever they cut from public lands and that there is no profit to be obtained therefrom, such tresspasses will cease; and you concur in that statement and affirm that it accords with the experience of your office.

I have carefully considered the letter of the special agent and your office letter transmitting it. I am especially impressed with the statement made by your office that convictions in criminal action against wealthy individuals or corporations are rarely obtained, and that when they are obtained a mere nominal fine is usually the result, and that with every failure to convict the prestige of the Government is lowered, and trespassing upon the Government lands becomes more defiant and frequent.

If, as stated, convictions are rarely secured, it is an indication either the cases are not properly investigated and prepared in the first instance by the officers of this Department, or that there is a woeful lack of vigor and efficiency in their prosecution. If it is the former, it should be corrected at once. If the latter, the attention of the Department of Justice should be called to it without delay.

It is inconceivable to my mind that where there is a case of willful trespass, where the facts are undisputed or clearly established, where the property of the Government has been taken willfully and deliberately, whether by a rich man or a poor one, that the arm of the Government is not strong enough to administer adequate punishment and vindicate the majesty of the law.

I am aware of the difficulties with which special agents have to contend in the investigation and preparation of these cases, but if they are carefully and conscientiously investigated and prepared, and, where willful in character, vigorously prosecuted, both civilly and criminally, better results will, in my judgment, be obtained than by adopting the policy suggested by Mr. Schwartz and your office, and would not put the Department in the attitude of condoning a violation of the law.

The effect of the policy suggested by the special agent and your office might be as good upon the individual, but it would not be so, in my

judgment, upon the community; for the next individual disposed to trespass upon the public lands would feel that he could do so with impunity, as in case of detection the only inconvenience he would be required to suffer would be to pay the Government the value of the timber.

Besides, the judgment of the most capable special agent and others, familiar with local sentiment and conditions, as to the probability of obtaining a conviction in such cases, is often at fault. Such instances are known to the Department.

Existing laws, if vigorously enforced, are amply adequate to protect and preserve the public timber, and it is to secure such an enforcement of those laws that this Department should bend its energies. There will, of course, arise cases of willful trespass where it will be advisable to accept the proposition of settlement and waive criminal proceedings, the evidence being insufficient to convict. But this is not such a case, and as the proposition of settlement appears to have been submitted with the understanding that, if accepted, criminal proceedings would be waived, it is hereby rejected, and you are directed to prepare the case for submission to the Attorney-General for the institution of both civil and criminal proceedings against all the parties involved.

Wells *v.* Nickles.

(104 U. S., 444.)

While no act of Congress expressly authorizes the Secretary of the Interior or other officer of the Land Department to appoint timber agents, the appropriation of money by Congress to pay them is a recognition of the validity of their appointment.

Where the instructions of the Commissioner of the General Land Office directed the agents to seize and sell timber cut on the public lands, and also authorized them to compromise with the trespasser on his paying a reasonable compensation for the timber cut and taken away, *Held*, That a compromise so made by which he pays all the costs and expenses of the seizure, and gives bond to pay for the timber when its value shall be ascertained, pursuant to the agreement, is binding on the United States.

This compromise, should, in violation of its terms, the property be seized and sold by such agents, is evidence of his title and right of possession in his action against their vendee for the recovery of the property.

SETTLEMENT FOR TRESPASS UNDER ACT OF JUNE 3, 1878 (20 STAT., 89).

* * * * * * *

Sec. 5. That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents

per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: *Provided*, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: *And further provided*, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

The provisions of this act are extended to all the public-land States by the act of August 4, 1892 (27 Stat., 348). (See p. 101.)

PAYMENT OF $2.50 PER ACRE, UNDER SECTION 5 OF THE ACT OF JUNE 3, 1878 (20 STAT., 89), ONLY RELIEVES FROM CRIMINAL LIABILITY.

UNITED STATES *v.* SCOTT ET AL.

Circuit court, northern district of California (39 Fed. Rep., 900.)

PUBLIC LANDS—CUTTING TIMBER—PAYMENT FOR LAND.

A party prosecuted for cutting timber on the public lands under section 2461, Revised Statutes, is only relieved from the criminal prosecutions and liabilities provided for in said section 2461 by payment of $2.50 per acre for the land on which it is cut, in pursuance of the provisions of the act of 1878 (1 Supp. Rev. Stat., p. 169, sec. 5); he is not relieved from his civil common-law liability to the United States as owner of the land for the value of the timber cut.

SETTLEMENT OF TRESPASS BY PURCHASE OF THE LAND TRESPASSED UPON.

(Act of June 15, 1880; 21 Stat., 237.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when any lands of the United States shall have been entered and the Government price paid therefor in full no criminal suit or proceeding by or in the name of the United States shall thereafter be had or further maintained for any trespasses upon or for or on account of any material taken from said lands, and no civil suit or proceeding shall be had or further maintained for or on account of any trespasses upon or material taken from the said lands of the United States in the ordinary clearing of land, in working a mining claim or for agricultural or domestic purposes or for maintaining improvements upon the land of any bona fide settler or for or on account of any timber or material taken or used by any person without fault or knowledge of the trespass or for or on account of any timber taken or used without fraud or collusion by any person who in good faith paid the officers or agents of the United States for the same or for or on account of any alleged conspiracy in relation thereto: *Provided*, That the provisions of this section shall apply only

to trespasses and acts done or committed and conspiracies entered into prior to March first, eighteen hundred and seventy-nine: *And provided further*, That defendants in such suits or proceedings shall exhibit to the proper courts or officer the evidence of such entry and payment and shall pay all costs accrued up to the time of such entry.

* * * * * * *

SEC. 4. This act shall not apply to any of the mineral lands of the United States; and no person who shall be prosecuted for or proceeded against on account of any trespass committed or material taken from any of the public lands after March first, eighteen hundred and seventy-nine, shall be entitled to the benefit thereof.

SALE OF PUBLIC TIMBER.

Public timber unlawfully cut may be disposed of by public sale after advertisement, or by private sale, either with or without previous advertisement. (See Department of Justice to Secretary of the Interior, August 23, 1886, p. 56).

Advertising must be by consent of Secretary of the Interior. (See Rev. Stat., 1878, sec. 3828.)

DISPOSITION OF MONEYS COLLECTED FOR DEPREDATIONS UPON PUBLIC LANDS.

MOIETY.

SEC. 4751. All penalties and forfeitures incurred under the provisions of sections twenty-four hundred and sixty-one, twenty-four hundred and sixty-two, and twenty-four hundred and sixty-three, Title "The Public Lands," shall be sued for, recovered, distributed, and accounted for, under the directions of the Secretary of the Navy, and shall be paid over, one-half to the informers, if any, or captors, where seized, and the other half to the Secretary of the Navy for the use of the Navy pension fund; and the Secretary is authorized to mitigate, in whole or in part, on such terms and conditions as he deems proper, by an order in writing, any fine, penalty, or forfeiture so incurred.

(Act of Apr. 30, 1878; 20 Stat., 46.)

* * * * * * *

SEC. 2. * * * *Provided*, That all moneys heretofore, and that shall hereafter be, collected for depredations upon the public lands shall be covered in the Treasury of the United States as other moneys received from the sale of public lands: *And provided further*, That where wood and timber lands in the Territories of the United States are not surveyed and offered for sale in proper subdivisions, convenient of access, no money herein appropriated shall be used to collect any charge for wood or timber cut on the public lands in the Territo-

ries of the United States for the use of actual settlers in the Territories and not for export from the Territories of the United States where the timber grew: *And provided further*, That if any timber cut on the public lands shall be exported from the Territories of the United States, it shall be liable to seizure by United States authority wherever found.

TIMBER LANDS IN THE STATES OF CALIFORNIA, OREGON, NEVADA, AND IN WASHINGTON TERRITORY.

(Chapter 151; approved June 3, 1878; 20 Stat., 89.)

* * * * * * *

SEC. 5. That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: *Provided*, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: *And further provided*, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

The act of August 4, 1892 (27 Stat., 348), extends the provisions of this act to all the public-land States.

MOIETY CLAUSE OF SECTION 4751, U. S. R. S., MODIFIED AND PARTLY REPEALED.

(17 Op., p. 592.)

The provisions in section 2 of the act of April 30, 1878, chapter 76, requiring moneys collected for depredations upon the public lands to be covered into the Treasury, in effect modifies section 4751, Revised Statutes, only as to that part of the penalties, etc., recovered which was payable under the latter section to the Secretary of the Navy; it does not affect the part payable thereunder to informers.

Section 5 of the act of June 3, 1878, chapter 151, applies to the Pacific States and Washington Territory, and repeals section 4751, Revised Statutes, only so far as concerns such States and Territory.

DEPARTMENT OF JUSTICE, *July 19, 1883.*

SIR: Yours of the 16th instant incloses a note addressed to yourself from the United States attorney for eastern Michigan, which informs you that certain fines under section 2461, Revised Statutes, are now in

the registry of the district court for his district, and that he supposes them to be *distributable* under your direction (to the informer, etc.) under section 4751.

You also inclose certain letters upon the same subject from the files of your Department (dated September 12, 1879, September 3, 1880, and October 14, 1880), in the course of which the Solicitor of the Treasury intimates a doubt whether section 4751 has not been in effect repealed by the act of April 30, 1878 (chap. 76, sec. 2), such doubt being, as he says, somewhat affected by the circumstance that this section was subsequently (act of June 3, 1878, chap. 151, sec. 5) expressly repealed *as to certain States only.*

Upon the whole matter you ask how far your powers under section 4751 have been modified by subsequent legislation, the practical question being that as to *distribution*, presented above, in eastern Michigan.

As my attention has not been called to any subsequent legislation other than the acts of 1878 cited in your letter, I will confine what I have to say to their operation only.

Section 4751 makes a threefold provision as to its subject-matter, i. e., *depredations* upon timber standing upon the public lands: (1) Suits therefor shall be under the direction of the Secretary of the Navy; (2) one-half of any penalties, etc., recovered shall be paid to informers and the other half to the Secretary of the Navy, and (3) the Secretary is authorized to mitigate penalties, etc., so incurred.

Thereupon the act of April, 1878, provided "that all moneys heretofore and that shall hereafter be collected for depredations upon the public lands shall be covered into the Treasury of the United States as other moneys received from the sale of public lands" (Supp. Rev. Stat., 316), and the act of June 3, 1878 (Supp. Rev. Stat., 328)—the main purpose of which was to provide for the *sale* of the public timber lands in the Pacific States and Washington Territory—after repeating the provision just quoted for all sales so to be made, goes on immediately thereafter to expressly repeal section 4751 so far as concerns such States and Territories.

Referring to the *threefold operation of* section 4751 above mentioned, it is plain that it is not *repealed* by the act of April, 1878. For instance, this latter enactment does not touch the powers of the Secretary as regards the superintendence of suits or the mitigation of penalties. The opinion of the Attorney-General of February 17, 1882, referred to by you, goes upon this view, although it is one only *incidental* to the point which he there discusses.

I am now asked in effect how far this act modifies the provision designated above as "(2)."

In my judgment it applies only to that part of the penalty which is *payable to the Secretary.*

Since the year 1831, when the provisions of section 4751 were first

enacted, it has become the general policy of the United States to require that all moneys collected in behalf of the United States shall be paid into the Treasury (Rev. Stat., sec. 3617). Some exceptions thereto, not depending upon any special reason, which here and there had escaped attention, are gradually disappearing. I regard the provision of the above act of 1878 merely as putting an end to one of these exceptions.

This is the more evident from the circumstance that it operates expressly upon all collections *theretofore* as well as upon those *thereafter*. As the legislature could not have meant to disturb the informer's rights in the former cases—at all events in many of them—it appears that they were not *advertent*, or therefore *referring*, to such rights *in any case*.

So that what is meant is, that so much of such money as is collected for the *United States shall be* paid *into the Treasury*, and not, as theretofore, to *the Secretary*. The emphasis is upon *the disposal*, not the *proportion* of certain moneyed interests of the United States.

That this is the true interpretation appears also from a corresponding passage in the act of June, 1878, where, although section 4751 is expressly *repealed*, yet express provision (*ex abundanti*) is added as to the payment *into the Treasury* of the proceeds of the sales therein ordered; as if it had not been enough to repeal the provision which gave what had been, to a certain extent, the equivalents of such proceeds *to the Secretary*, but were necessary also to direct expressly that the proceeds themselves shall follow the general direction of public moneys.

The two acts of 1878, therefore, have their distinct operations, that of April applying to the whole country, and merely directing that whatever moneys vest in the United States under section 4751 shall thereafter be paid into the Treasury, that of June applying to certain localities only, and for them entirely annulling section 4751, adding also a proviso that any moneys which might arise from the methods therein devised as substitutes for those referred to in section 4751 should (in like manner) be paid *into the Treasury*.

Very respectfully,

S. F. Phillips,
Acting Attorney-General.

The Secretary of the Navy.

MOIETY CLAUSE OF SECTION 4751, U. S. R. S., REPEALED AS REGARDS ALL PUBLIC-LAND STATES.

Department of Justice,
Washington, D. C., May 9, 1895.

Sir: Replying, as promised by my letter to you of the 15th ultimo, to your inquiries concerning the proper construction of section 2461, R. S. U. S., relating to timber trespass on public lands, and section

4751, R. S., relative to the moiety allowed to informers, as affected by the act of June 3, 1878 (20 Stat., 89; 1 Supp. R. S., p. 169), relating to public lands in California, Oregon, Nevada, and Washington Territory, providing for settlement of prosecutions and repealing said section 4751, and as affected by the act of August 4, 1892 (27 Stat., 348), making general as to all public-land States the said act of 1878, I will say that I perceive no reason for doubting that prosecutions in Wisconsin under said section 2461 are covered by the provision of the act of 1878 (as amended by said act of 1892) in regard to settlement of prosecutions for the sum of $2.50 per acre. As relates to informers, I am of the opinion that said section 4751 is repealed as to all the "public-land States," which, of course, includes Wisconsin. If you, or any informer, desire decisive settlement of these points, you may institute a test case in order to bring them before the court.

Respectfully,

RICHARD OLNEY,
Attorney-General.

Mr. H. E. BRIGGS,
United States Attorney, Madison, Wis.

SEIZURE.

TIMBER UNLAWFULLY CUT ON PUBLIC LANDS.

(18 Op., 434.)

The Land Department has authority to make seizure, through its officers or agents, of timber unlawfully cut on the public lands.

Timber unlawfully cut on the public lands, which has been seized by duly authorized agents of the Land Department and is in their custody, may be disposed of by that Department; and whether this be done by public or private sale, with or without previous advertisement, is a matter entirely discretionary therewith.

DEPARTMENT OF JUSTICE, *August 23, 1886.*

SIR: By your letter to the Attorney-General of the 14th ultimo attention is called to a communication received by you from the Commissioner of the General Land Office, a copy of which was transmitted therewith, touching the disposition of a large quantity of timber alleged to have been unlawfully cut on the public lands in Montana Territory and which has recently been seized as the property of the United States under instructions from that office, and the question presented for consideration is, Whether the Commissioner may "direct the sale of the property so seized; and, if so, whether it may be disposed of at private sale, and in such way as may be both to the advantage of the Government and to the benefit of the community, without advertising the same?" Having carefully examined this subject, I now beg to submit the following in reply:

The question proposed seems to involve a preliminary inquiry,

namely, as to the authority of the officers of the Land Department to make seizure of timber unlawfully cut on the public lands. Upon this point I entertain no doubt.

Congress has provided a remedy for the protection of the timber on the public lands by imposing certain penalties and forfeitures (see sec. 2461 and 2462, Rev. Stat.; also sec. 3 of the act of June 3, 1878, chap. 150, and sec. 4 of the act of June 3, 1878, chap. 151), which can only be enforced by indictment or information; and by section 2 of the act of April 30, 1878, chapter 76, it is further provided "that if any timber cut on the public lands shall be *exported from the Territories* of the United States it shall be liable to seizure by United States authority wherever found."

But these statutory remedies are not the only ones available to the Government. In Cotton *v.* United States (11 How., 229) it was held that the United States have a right to bring an action of trespass *quare clausum fregit* against a person for cutting and carrying away trees from the public lands. Agreeably to the doctrine of that case the United States may resort to the same civil remedies for the protection of their property which are open to any other proprietor. Thus they may seize the timber cut, arrest it by replevin, or recover damages in trespass for the taking and conversion. (United States *v.* Cook, 19 Wall., 594.) These are the ordinary remedies given by the common law for the recovery of personal property or its value. Seizure or recaption (which is one of them) is a remedy by the mere act of the party injured, and may be resorted to for the recovery of such property where its exertion will not endanger the public peace. (3 Black. Com., 4.)

Authority to exert this remedy in behalf of the United States must be deemed to belong to the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior, as a power included in the general duties respecting the public lands which are devolved upon him (sec. 453, Rev. Stat.). Such authority, indeed, has long been asserted and frequently exercised by the Land Department through its officers or agents, the latter acting under instructions issued by the Commissioner, with the sanction of the Secretary. Referring to this, the Supreme Court, in Wells *v.* Nickles (104 U. S., 447), observes:

> The Department of the Interior, under the idea of protecting from depredation timber on the lands of the Government, has gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced. In aid of this the registers and receivers of the Land Office have, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. If any authority to do this was necessary, it may be fairly inferred from appropriations made to pay the services of these special timber agents.

In that case a compromise by timber agents with a trespasser respecting the disposition of timber cut by him on the public lands and seized

by such agents, which was made in conformity to instructions of the Commissioner of the General Land Office, was held to be valid. This amounts to an affirmation of the authority of the Commissioner, through those agents, to act for the United States in matters connected with timber depredations on the public domain; and I think it safe to say that under such authority the remedy by recaption or seizure, as well as any other of the before-mentioned common-law remedies, may be resorted to for the recovery of timber unlawfully cut on the public lands, according to the circumstances of the case. While I entertain no doubt as to the existence of the remedy by seizure, yet its liability to abuse and to become an instrument of oppression demand that it should be used with judicious discretion and only in clear or emergent cases, and except in such cases the regular procedure of the courts should be preferred.

As to the authority of the Commissioner to dispose of such timber by public or private sale, where the same has been seized by duly authorized agents of the Land Department and remains in their custody, I apprehend that this power exists, subject to the general supervision or direction of the Secretary of the Interior. There being no statutory provision covering a case of that kind, or regulating the disposition of the property, it must be regarded as a subject left to the Land Department to be dealt with in such manner as in the judgment of that Department will best protect the interests of the Government. As the property is perishable in its nature, and its custody may involve expense, it is not only within the power but it is the duty of the Department, for the avoidance of loss to the Government, to convert the same into money; and whether this be done by public or private sale is a matter entirely discretionary with it. While ordinarily the public interests (which are always to be kept in view) will be best subserved by a public sale after advertisement, yet I perceive no objection, legal or other, to a private sale either with or without previous advertisement, where the mode of disposal is advantageous to the Government, but as a general rule public sale should be had.

In direct response to the question presented by you, I therefore submit that, in my opinion, the Commissioner may direct the sale of the property seized, and that "it may be disposed of at private sale, and in such way as may be both to the advantage of the Government and to the benefit of the community without advertising the same."

I am, sir, very respectfully,

G. A. Jenks,
Acting Attorney-General.

The Secretary of the Interior.

Wells *v.* Nickles.

(104 U. S., 444.)

While no act of Congress expressly authorizes the Secretary of the Interior or other officer of the Land Department to appoint timber agents, the appropriation of money by Congress to pay them is a recognition of the validity of their appointment.

Where the instructions of the Commissioner of the General Land Office directed the agents to seize and sell timber cut on the public lands, and also authorizes them to compromise with the trespasser on his paying a reasonable compensation for the timber cut and taken away: *Held*, That a compromise so made by which he pays all the costs and expenses of the seizure, and gives bond to pay for the timber when its value shall be ascertained, pursuant to the agreement, is binding on the United States.

This compromise, should, in violation of its terms, the property be seized and sold by such agents, is evidence of his title and right of possession in his action against their vendee for the recovery of the property.

(Act of Apr. 30, 1878; 20 Stat., 46.)

Sec. 2. * * * *And provided further*, That if any timber cut on the public lands shall be exported from the Territories of the United States, it shall be liable to seizure by United States authority wherever found.

Thomas Stephenson *v.* William L. P. Little and others.

Supreme court of Michigan (10 Mich. Rep., 433).

* * * * * * *

The General Government has all the common-law rights of an individual in respect to depredations committed upon the public lands, and the Commissioner of the General Land Office—being the proper executive department to enforce those rights—in the absence of legislation by Congress on the subject—may lawfully direct the seizure and sale by the local land officers, on behalf of the Government, of timber cut by trespassers on the public lands.

The party guilty of a fraudulent admixture of saw logs owned by himself with those owned by another, so that it is impossible any longer to identify his own, loses all interest in them, and is remediless if such other person appropriate the whole mass to his own use. Per Manning, jr., Christiancy, J., concurring. Campbell, J., dissented, holding that where the evidence showed the logs to be of a uniform value per thousand feet the person who had intermingled them was entitled to reclaim from the common mass an equivalent to his own logs. Martin, Ch. J., gave no opinion on this question.

Per Martin, Ch. J.: The person whose property another has fraudulently admixed with his own has the right to take possession of the whole mass for the purpose of separating and securing, or of disposing of, the portion belonging to himself; and if it can not be separated, and he advertise and sell his interest in the whole, he does not thereby render himself liable to the other for the conversion of his property. He has at the very least, as respects the property so commingled, the rights of a tenant in common.

Norris et al. *v.* United States.

Circuit court, western district of Louisiana (44 Fed. Rep., 735).

Action for Timber Cut on Public Land—Burden of Proof.

Where in an action by the United States to recover the value of logs cut on public land the plaintiff's evidence shows that the defendant purchased from the trespasser and converted to his own use a large number of logs, among which were some of those cut from the public land, the burden is on the defendant to show that all the logs so bought by him were not so cut.

Confusion of Goods.

Where the logs so cut were mixed in the river with a large quantity of other logs, so that the identical logs could not be conveniently separated, the United States thereby acquired a proportionate interest in the entire mass of logs, under Rev. Civil Code La., art. 528, which provides that "when a thing has been formed by a mixture of materials belonging to different proprietors, * * * if the materials can not be separated without inconvenience, their owners acquire in common the *pro rata* of the thing."

Handford et al *v.* United States.

Circuit court of appeals, eighth circuit (92 Fed. Rep., 88).

United States—Action to Recover Logs.

Where the United States claims the ownership of logs in the possession of another, on the ground that they were cut from Government land, its remedy, like that of an individual, is by an action of replevin or trespass. It can not seize the logs from one having them in his possession, and, by filing a libel against them, cast upon him the burden of proving his ownership, and a district court is without jurisdiction of such a proceeding.

United States *v.* Price Trading Company et al.

Circuit court of appeals, eighth circuit (109 Fed. Rep., 239).

* * * * * * *

Timber Wrongfully Cut—Subsequent Sale for Authorized Use.

Where timber has been wrongfully cut from public lands of the United States, and while in the hands of a purchaser has been claimed as the property of the United States by its agent, the title of the Government can not be divested by a subsequent sale of the timber by such purchaser to a railroad company for use in the construction of its road, although the company would have had the right to cut it for such purpose had it been standing.

TIMBER UNLAWFULLY CUT ON INDIAN LANDS.

(19 Op., p. 710.)

Where a large quantity of standing timber (about 4,000,000 feet) was unlawfully cut by trespassers on the Fond du Lac Indian Reservation, in Minnesota, and left lying thereon—the land from which the timber was cut being held in common by the Indian bands for whom it was reserved by the ordinary Indian title: Advised, (1) that the United States have the absolute ownership of the timber thus cut; (2) that the Indians have no interest therein whatever, and that it in no way appertains to the Indian Bureau or its agents to assume charge thereof; (3) that such timber may be sold for and on account of the United States, but that sale

should be made by the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. Opinion of Acting Attorney-General Jenks of August 23, 1886 (18 Op., 434), concurred in. (See p. 56.)

See United States *v.* Cook (19 Wall., 591), cited on page 62.

See, also, "Timber on Indian allotments and Indian reservations" (19 Op., p. 232), cited on page 149.

SAWMILLS ON PUBLIC LANDS.

[Acting Commissioner of General Land Office to Secretary of the Interior, March 2, 1886, in case of public timber trespass by Robert H. Longwell, Colorado.]

* * * I have to state that I am not aware of any statute expressly authorizing the seizure and sale of sawmills erected on the public domain by timber depredators or intruders thereon, but I am of the opinion that the title to such mills should be held to be in the United States under the principle of common law which gives to the owner of real estate all houses, fixtures, and other improvements placed thereon by strangers without the knowledge and consent of such owner. The depredator in this case had no color of right or title to the land nor license to go upon the same, and the mill was erected thereon without authority. As soon as the material was attached to the land it became a part of the realty, and the title passed to the Government. (See Sedgwick and Tait on Trial of Titles to Land, pp. 361, 690, and Gerald Real Estate, p. 107.)

I would suggest, as the United States attorney expresses doubt as to whether the mill can be seized prior to the termination of the suit for the trespass, that the parties be restrained by injunction from removing the mill and appurtenances from the land pending the determination of the suit for damages.

See Erhardt *v.* Boaro and others, cited on page 64.

CUT TIMBER.

NOT A PART OF THE REALTY.

SCHULENBERG ET AL. *v.* HARRIMAN.

(21 Wall., 44.)

* * * * * * *

Where the title to land remains in the State, timber cut upon the land belongs to the State. Whilst the timber is standing it constitutes a part of the realty; being severed from the soil, its character is changed; it becomes personalty, but its title is not affected; it continues as previously the property of the owner of the land, and can be pursued wherever it is carried. All the remedies are open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property.

Where logs cut from the lands of the State without license have been intermingled with logs cut from other lands, so as not to be distinguishable, the State is entitled, under the law of Minnesota, to replevy an equal amount from the whole mass. The remedy afforded by the law of Minnesota in such case held to be just in its operation and less severe than that which the common law would authorize.

HUTCHINS ET AL. *v.* KING.

(1 Wall., 53.)

Growing timber constitutes a portion of the realty, and is embraced by a mortgage of the land. When it is severed from the freehold without the consent of the mortgagee, his right to hold it as a portion of his security is not impaired.

When the amount due according to the stipulation of the mortgage is paid, the lien of the mortgage upon the timber thus severed is discharged, and the property reverts to the mortgagor, or any vendee of the mortgagor. Any sale of the timber by the mortgagee, or assignee of the mortgagee, after such payment is a conversion for which an action will lie by the mortgagor or his vendee.

D. cut and piled posts on lands belonging to the State. While he was thus engaged R. purchased the land, and afterwards replevied the posts, some of which were cut before and some after the purchase. *Held*, that R. had no title to those cut prior to his purchase. (United States Digest, Vol. II, p. 590 (1869); Rogers *v.* Bates, 1 Mich. (N. P.), 93.)

The sale of standing timber is the sale of an interest in real estate, and a subsequent purchaser by warranty deed of the land with notice of such sale can not maintain trespass against the prior purchaser of the timber for cutting and removing the timber. (United States Digest, Vol. VII, p. 839; Russell *v.* Meyers, 32 Mich., 522.)

USE OF CUT TIMBER BY VIRTUE OF A RIGHT OF OCCUPANCY.

UNITED STATES *v.* COOK.

(19 Wall., 591.)

Timber standing on lands occupied by the Indians can not be cut by them for the purposes of sale alone; though when it is in their possession, having been cut for the purpose of *improving* the land—that is to say, better adapting it to convenient occupation—in other words, when the timber has been cut incidentally to the improvement, and not cut for the purpose of getting and selling it—there is no restriction on the sale of it.

The Indians, having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber. Every purchaser from them is charged with notice of this presumption. To maintain his title it is incumbent on him to show that the timber was rightfully severed from the land.

The United States may maintain an action for unlawfully cutting and carrying away timber from the public lands.

* * * * * * *

The Chief Justice delivered the opinion of the court:

We think the action was properly brought, and that it may be maintained.

The right of the Indians in the land from which the logs were taken was that of occupancy alone. They had no power of alienation except to the United States. The fee was in the United States, subject only to this right of occupancy. This is the title by which other Indians hold their lands. It was so decided by this court as early as 1823 in

Johnson *v.* McIntosh.[a] The authority of that case has never been doubted.[b] The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy.[c] The possession when abandoned by the Indians attaches itself to the fee without further grant.[d]

This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

The timber while standing is a part of the realty, and it can only be sold as the land could be. The land can not be sold by the Indians, and consequently the timber, until rightfully severed, can not be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under such circumstances is, in effect, only a legitimate use of the land. In theory, at least, the land is better and more valuable with the timber off than with it on. It has been *improved* by the removal. If the timber should be severed for the purposes of sale alone—in other words, if the cutting of the timber was the principal thing and not the incident—then the cutting would be wrongful, and the timber when cut become the absolute property of the United States.

These are familiar principles in this country and well settled, as applicable to tenants for life and remainder-men. But a tenant for life has all the rights of occupancy in the lands as a remainder-man. The Indians have the same rights in the lands of their reservations. What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more.

In this case it is not pretended that the timber from which the saw logs were made was cut for the purpose of improving the land. It was not taken from any portion of the land which was occupied, or, so far as appears, intended to be occupied for any purpose inconsistent with the continued presence of the timber. It was cut for sale and nothing else. Under such circumstances, when cut, it became the

---

[a] 8 Wheaton, 574.

[b] 1 Kent, 257; Worcester *v.* Georgia, 6 Peters, 580.

[c] Cherokee Nation *v.* Georgia, 5 Peters, 48.

[d] Ib., 17.

property of the United States absolutely, discharged of any rights of the Indians therein. The cutting was waste, and in accordance with well-settled principles the owner of the fee may seize the timber cut, arrest it by replevin, or proceed in trover for its conversion.

The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber. Every purchaser from them is charged with notice of this presumption. To maintain his title under his purchase it is incumbent on the purchaser to show that the timber was rightfully severed from the land.

That the United States may maintain an action for cutting and carrying away timber from the public lands was decided in Cotton *v.* United States.[a] The principles recognized in that case are decisive of the right to maintain this action.

The answer of the court, therefore, to the question propounded by the circuit court, is in the affirmative.

See 19 Op., 710, cited on page 60.

See also 19 Op., 232, cited on page 149.

INJUNCTION.

Erhardt *v.* Boaro and others.

Appeal from the circuit court of the United States for the district of Colorado (113 U. S. 537).

Mr. Justice Field delivered the opinion of the court:

* * * It is now a common practice in cases where irremedial mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. (Jerome *v.* Ross, 7 Johns., ch. 315, 332; Le Roy *v.* Wright, 4 Sawyer, 530, 535.)

Nichols *v.* Jones and another.

Circuit court northern district of Alabama (19 Fed. Rep., 855).

Injunction.

Injunctions are granted to prevent trespasses as well as to stay waste where the mischief would be irreparable, and to prevent a multiplicity of suits.

Wilson and others *v.* Rockwell and others.

Circuit court district of Colorado (29 Fed. Rep., 674).

Injunction—Trespass—Title.

A party showing an equitable title to realty will be protected against trespassers by injunction, though the location of the legal title has not been finally determined.

---

[a] 11 Howard, 229.

THEODORE LE ROY *v.* GEORGE WRIGHT ET AL.

Circuit court northern district of California (4 Sawyer, 530).

* * * * * * *

COURTS OF EQUITY WILL NOT INTERFERE.

Courts of equity will not ordinarily interfere to injoin the commission of a threatened trespass to real property unless the trespass be one going to the destruction of the substance of the estate, such as the extracting of ores, the cutting down of timber, the digging of coal, and the like. The jurisdiction of the court in such cases is asserted for the preservation of the property pending proceedings at law for the determination of the title.

UNITED STATES *v.* GEAR.

(3 Howard, 120.)

* * * * * * *

Digging lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to a writ of injunction to restrain it.

INJUNCTION TO STAY WASTE.

An injunction to stay waste is allowed as a matter of course. (United States Digest, Vol. I, p. 401 (1863); Markham *v.* Howell, 33 Ga., 508.)

Mines, quarries, and timber are protected by injunction, upon the ground that injuries and depredations upon them are or may cause irreparable damage, and also with a view to prevent a multiplicity of actions for damages that might accrue from a continuous violation of the rights of the owners. In such cases the plaintiff's right need not be first established at law. (United States Digest, Vol. III, p. 359 (1871); West Point Iron Co. *v.* Reymert, 45 N. Y., 703.)

The unlawful quarrying and removal of stone wherein consists the chief value of land may be restrained by injunction. (United States Digest, Vol. XVI, p. 347; Althen *v.* Kelly, 32 Minn., 280.)

Entry on land and digging up and removing fruit trees thereon is waste which may be enjoined. (United States Digest, Vol. XVI, p. 347; Silva *v.* Garcia, 65 Cal., 591.)

An injunction will be granted to stay waste threatened or being committed. (United States Digest, Vol. XVII, 337; Sheridan *v.* McMullin, 12 Oreg., 150.)

INSTITUTION OF CIVIL PROCEEDINGS.

No civil proceedings in connection with timber trespasses on public lands should be instituted in the name of the United States without instructions from the proper authority. See the following letter and the subjoined regulations of the Solicitor of the Treasury referred to therein:

DEPARTMENT OF JUSTICE,
Washington, D. C., September 16, 1895.

SIR: I have the honor to acknowledge the receipt of your letter of the 12th instant, in which you request that reply may be made to certain inquiries contained in a

letter of the Acting Commissioner of the General Land Office (a copy whereof you inclose) in regard to the institution of civil proceedings in timber trespass cases by United States district attorneys in the various States and Territories without recommendation from the Department of the Interior or instructions from this Department.

(1) Considering the several inquiries in their order, I beg to state that I was not aware, until informed by the said letter of the Acting Commissioner, of his office having received information to that effect, that United States attorneys, or any United States attorney, had instituted civil actions for timber trespass without the recommendation or instructions referred to. By the first paragraph of the regulations made by the Solicitor of the Treasury, with the approbation of the Attorney-General, for the observance of United States attorneys and marshals, which regulations are embodied in the pamphlet of "Instructions to United States Marshals, Attorneys, Clerks, and Commissioners," issued by the Attorney-General July 1, 1895, it is provided that, except in extraordinary cases of emergency, no United States attorney will commence or defend a civil suit or proceeding in court, in the name or for the benefit of the United States, without instructions from the office of the Solicitor of the Treasury, or by direction of the Attorney-General, or some person or court authorized by law so to direct. This provision is found upon pages 52 and 53 of said pamphlet, a copy of which I have the honor to hand you herewith.

(2) Should civil action be commenced by a United States attorney, in disregard of said regulation, it would not, in my opinion, render the action void, or jeopardize the interests of the United States involved therein, but would constitute merely a violation of a departmental regulation, and not a violation of law.

(3) It is not now, and so far as I have been able to ascertain, it has not been the practice of this Department to direct the institution of civil proceedings in timber trespass cases, except upon the recommendation of the Department of the Interior.

Respectfully,

JUDSON HARMON, *Attorney-General.*

The SECRETARY OF THE INTERIOR.

REGULATIONS OF THE SOLICITOR OF THE TREASURY.

The following are regulations prescribed by the Solicitor of the Treasury under authority of sections 377 and 379, Revised Statutes, which must be fully and carefully complied with:

1. No United States attorney will commence or defend a civil suit or proceeding in court, in the name or for the benefit of the United States, without instructions from this office or by direction of the Attorney-General or some person or court authorized by law so to direct, except in extraordinary cases, where some material interest of the United States would, in his opinion, be lost or endangered by delay; and in such cases, he will immediately report his action with his reason therefor.

2. Whenever a United States attorney shall receive from a public officer, or shall in any other manner become possessed of information which shall lead him to believe that a trespass upon the property of the United States, or an infraction of its revenue or other laws, has been committed, he will immediately report such information to this office, with his opinion as to the propriety of instituting suit; or in case the remedy of the United States would, in his opinion, be lost or endangered by delay, he may immediately commence a suit, and report the same, with his reason for such proceeding.

TIMBER ON MINERAL LANDS.

Mineral lands are those which are more valuable for the mineral therein (except coal) than for agricultural purposes or for the timber thereon.

The right to take timber from mineral lands for building, agricultural, mining, or other domestic purposes is specially provided for by the following act of Congress:

[Act of June 3, 1878, Chap. 150; 20 Stat., 88.]

AN ACT authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States and other persons, bona fide residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakoto, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

CIRCULAR.

(29 L. D., 571.)

RULES AND REGULATIONS GOVERNING THE USE OF TIMBER ON PUBLIC MINERAL LANDS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January 18, 1900.*

By virtue of the power vested in the Secretary of the Interior by the first section of the act of June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes," the following rules and regulations are hereby prescribed:

1. The act applies to the States of Colorado, Nevada, Montana, Idaho, Wyoming, North Dakota, South Dakota, and Utah, and the Territories of New Mexico and Arizona, and all other mineral districts of the United States.

2. The land from which timber may be felled or removed under the provisions of this act must be known to be of a *strictly mineral* character and "not subject to entry under existing laws of the United States, except for mineral entry." Parties who take timber from the public lands under assumed authority of this act must stand prepared to show that their acts are within the prescribed terms of the law granting such privilege, the burden being on such parties of proving by a preponderance of evidence that the land from which the timber is taken is "mineral" within the meaning of the act.

3. The privileges granted are confined to citizens of the United States and other persons, *bona fide* residents of the States, Territories, and other mineral districts provided for in the act.

4. The uses for which timber may be felled or removed are limited by the wording of the act to "building, agricultural, mining, or other domestic purposes."

5. No timber is permitted to be felled or removed for purposes of sale or traffic, or to manufacture the same into lumber or other timber product as an article of merchandise, or for any other use whatsoever, except as defined in section 4 of these rules and regulations.

6. No timber cut or removed under the provisions of this act may be transported out of the State or Territory where procured.

7. No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.

8. No growing trees of any kind whatsoever less than eight inches in diameter are permitted to be cut.

9. Persons felling or removing timber under the provisions of this act must utilize all of each tree cut that can be profitably used, and must dispose of the tops, brush, and other refuse in such manner as to prevent the spread of forest fires.

10. These rules and regulations shall take effect February 15, 1900, and all existing rules and regulations heretofore prescribed under said act by this Department are hereby rescinded.

W. A. RICHARDS,
Acting Commissioner.

Approved, January 18, 1900.
E. A. HITCHCOCK, *Secretary.*

FORCE AND EFFECT OF RULES AND REGULATIONS BY THE SECRETARY OF THE INTERIOR UNDER THE ACT OF JUNE 3, 1878 (20 STAT., 88).

(*a*) The rules and regulations as to the cutting of timber upon the public lands of the United States prescribed by the Secretary of the Interior under laws, United States, Forty-fifth Congress, second session, chapter 150, will be considered such an act of the executive department of the United States as the courts will take judicial notice of under Revised Statutes, Montana, division 1, section 625; and it is not necessary to set out such rules in a complaint seeking to recover for an infringement thereof.

(*b*) Said law is constitutional, and the rules and regulations of the Secretary of the Interior made thereunder are not unconstitutional as trenching upon the domain of the legislative department of the Government.

(*c*) In the absence of any statutory license in the matter, the cutting of timber less than 8 inches in diameter constitutes a trespass. (See Land Office Report for 1887, p. 479, case of United States *v.* Williams and another; 6 Mont., 379.)

At the September term, 1886, of United States district court, Boise City, Idaho, Judge Broderick presiding, four Chinamen (Wing Ling, Ah Sin, et al.) were convicted of timber trespass on the public mineral lands for failing to utilize all of each tree cut that could profitably be used, and to take precautions to guard against the spread of forest fires, as required by Department regulations, under the act of June 3, 1878. (Circular, August 5, 1886, section 8; see Land Office Report for 1887, p. 480.)

UNITED STATES *v.* REDER.

District court, South Dakota (69 Fed. Rep., 965).

PUBLIC LANDS—CUTTING TIMBER FROM MINERAL LANDS—INDICTMENT.

On the trial of an indictment for cutting timber from the mineral lands of the United States for purposes other than those connected with building, agricultural, mining, or other domestic uses contrary to the act of June 3, 1878, the intent is wholly immaterial, and it is only necessary to show that the prohibited acts were done.

SAME—REGULATIONS BY SECRETARY OF THE INTERIOR.

One who cuts and removes timber from the mineral lands of the United States and sells the same, or the lumber manufactured therefrom, without taking from the purchaser any statement in writing as to the purposes for which the same is intended to be used, as required by the regulations made by the Secretary of the Interior under the authority of the act of June 3, 1878, is guilty of a violation of that statute and subject to the penalties prescribed by it.

UNITED STATES *v.* MADISON A. TIPTON.

United States circuit court, South Dakota, western division.

INSTRUCTIONS OF THE COURT, FEBRUARY 18, 1896.

Hon. A. D. THOMAS, *Presiding Judge:*

It is charged in the indictment that Madison A. Tipton committed the offense set forth, on the 3d day of August, 1894, in Pennington County.

I wish, in the first place, to advise you that the date alleged in the indictment, the 3d day of August, 1894, is not material when you come to consider the proof. When you come to the proof, it is not necessary to show that the offense, if any was committed, was in fact committed on that particular day alleged in the indictment. The indictment was found and filed in this court the 25th of September, 1895, and if you find that an offense was in fact committed, and committed within three years prior to that time, to wit, the 25th day of September, 1895, that answers the purpose of the statute and the rule of law.

In order that you may definitely understand the issues which you have to find—which you have to determine—I will read the indictment, or that portion which is material. It is charged that "Madison A. Tipton, late of Pennington County, in said district, on the 3d day of August, 1894, at Pennington County, unlawfully did cut, cause, and procure to be cut a large amount of timber, to wit, a large number of pine trees then and there growing and being on the public lands of the United States, the said trees then and there being and growing in one of the public-land districts of the United States of America, to wit, the State of South Dakota, with the intent then and there to export the same from the State of South Dakota, and with the intent then and there to dispose of the same contrary to the form, force, and effect of the statutes of the United States in such case provided, and contrary to the rules and regulations in pursuance thereof made by the Secretary of the Interior."

You will notice that the gist of the offense charged is the intent; that is, the gist of the offense is that he cut, caused, and procured to be cut timber, as charged, with the intent, first, to export it out of the State of South Dakota, and, second, to dispose of it contrary to the statute and the rules prescribed by the Secretary of the Interior.

To this indictment the defendant has interposed the plea of not

guilty, and by that plea has put the prosecution to the proof of all the material allegations of the indictment with that degree of certainty required in all criminal cases.

The indictment seems to have been drawn under section 4, chapter 151, found in the Supplement of the Statutes of the United States, and reads as follows, or that portion which is material for us at present:

"That after the passage of this act" (that was June, 1878) "it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any of the lands of the United States in said States and Territories" (and I would say that this law, by another law, is made applicable to the State of South Dakota. Understand me, this law which I now read is made applicable to this State by law of Congress), "or remove, or cause to be removed, any timber from said public lands with intent to export or dispose of the same." And then provides for punishment and conviction.

The charge in this indictment is cutting, causing and procuring to be cut, with the intent stated in the indictment.

Now, it has been shown by the evidence on the part of the Government that these lands from which the timber was alleged to have been taken and cut, or rather cut, were mineral lands of the United States, and therefore it is proper for me to read you another law, which must be taken in connection with the statute which I have just read. That is the law of June 3, 1878, found in 20 Statutes at Large, 88, chapter 150:

"That all citizens of the United States and other persons bona fide residents of the States of Colorado," etc. (including Dakota), "and all other mineral districts of the United States shall be, and are hereby, authorized and permitted to fell and remove for building, agricultural, mining, or other domestic purposes any timber or other trees growing or being upon the public lands, said lands being mineral and not subject to entry under existing laws of the United States except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes."

It is provided in section 3 of the act which I have just read as follows:

"Any person or persons who shall violate the provisions of this act or any rules and regulations in pursuance thereof made by the Secretary of the Interior shall be deemed guilty of a misdemeanor," and upon conviction shall be punished as prescribed in that statute.

The law is that it is competent for the Congress of the United States to provide in this class of cases as well as others, and it has been the constant practice of Congress to provide that the head of the Department, in this case the Secretary of the Interior, shall make rules and

regulations for the proper carrying out of the law, the proper execution of it, provide various details, and when the rules and regulations of the head of the Department, in this case the Secretary of the Interior, are made pursuant to the law they have the force and effect of law, become a part of the law.

While from section 4, which I first read, it would be a violation of the statute to cut or cause to be cut timber with the intention to export or dispose of the same, the law I just read—that is, the mineral law so called—permits certain persons to cut and remove timber from the mineral lands under certain conditions. It is necessary to remember what those conditions are. In other words, under section 4, which I first read, it is an offense to cut and remove timber, as you have heard there, with the intent to export or dispose of it contrary to the statute, contrary to the law which you have heard there. Now, the Government has granted a license to certain parties on certain conditions to cut timber and procure it to be cut upon the mineral lands of the United States, as in the statute I have read to you.

You will have to remember and consider whether this timber, if caused or procured to be cut, was cut under the regulations prescribed by this statute, and in accordance with certain rules of the Secretary of the Interior, to which I will call your attention.

First, who are the persons that may cut? Citizens of the United States, and other persons, bona fide residents of the State of South Dakota. They are authorized and permitted to fell and remove, for what? For building, for agricultural, for mining, or other domestic purposes. If upon the mineral lands of the United States, as therein designated, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and undergrowth, and for other purposes.

The Government owns these lands; it owned them at the time stated in the indictment, and it had a right to provide that no person should go upon those lands and cut or procure to be cut any timber for any purpose. It had a right to do that; but it saw fit to grant a license to certain persons under certain conditions by which timber might be cut, or some portion of it, as you have heard. The Government giving that license had a right to prescribe the conditions under which persons could exercise that license. Therefore it has, as you have heard, prescribed certain conditions designated in the statute, and it is therein provided that cutting, removing, etc., must be subject to the rules and regulations prescribed by the Secretary of the Interior.

Now, the Secretary of the Interior has prescribed certain rules. Two of those rules I will read and call your attention to. The courts and juries take judicial notice of those rules. They need not be proven as a part of the evidence. We take notice of them as of the law when made pursuant to the authority of Congress. I advise you these rules are made by the Secretary of the Interior pursuant to an act of Congress.

The first is rule 3: "No person not a citizen or bona fide resident of a State, Territory, or other mineral district provided for in said act is permitted to fell or remove timber from mineral lands therein." (No person not a citizen or bona fide resident of the State.) "And no person, firm, or corporation felling or removing timber under this act shall sell or dispose of the same, or the lumber manufactured therefrom, to any other than citizens and bona fide residents of the State and Territory where such timber is cut, nor for any other purpose than for the legitimate use of said purchaser for the purposes mentioned in said act," namely, for building, mining, agriculture, or other domestic purposes.

Rule 4: "Every owner or manager of a sawmill or other person felling or removing timber under the provisions of this act shall keep a record of all timber so cut and removed, stating time when cut, names of parties cutting the same, or in charge of the work, and describing the land from whence cut by legal subdivisions if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purposes for which sold; and shall not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining, or other domestic purposes within the State or Territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchases such timber or lumber exclusively for his own use, and for the purposes aforesaid."

Now, you have noticed as I have read to you and called your attention to the statute, that by section 3 "any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof, made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor," and punished as provided by law. As I said to you, the gist of the crime charged, the gist of the offense alleged, is the intent with which it was done, if at all, by the defendant. The question whether he intended to violate the law or not is not material. The question is, Did he cut, or cause or procure to be cut, timber with the intent to export or dispose of it contrary to law, as I have read it to you? That is the gist of the question. He had no right to cut for speculative purposes. If he cut at all it must be in accordance with the law and license of the Government.

That is a question for you to determine. Did the defendant cut, or cause or procure to be cut, timber on the mineral lands? Naturally, did he cut it himself, or cause it to be cut, or procure it to be cut? This is one question of fact that on the very threshold, from the evidence of this action, you will have to determine.

In this case, as generally, it is not practicable, or possible, often, to get direct evidence of an ultimate fact. Perhaps nobody saw the act done. So the jury, in this class of cases, as you do in your various affairs of life, draw inferences and conclusions—such conclusions and inferences as you think ought to be drawn from all the facts and circumstances established to your satisfaction. Take the evidence that you had before you; when you become satisfied, if you do, that it is true and reliable, draw such inferences as to whether or not this defendant cut or caused or procured somebody else to cut this timber for the purposes that he was manufacturing it, if you find he was manufacturing any timber; then the fair and reasonable inference. Draw such inferences as you think ought to be drawn.

If you find from the evidence that he cut, caused or procured to be cut, timber, then you come to the main question, With what intent did he cut it? Now, it is impossible to get into the human mind for the purpose of seeing the workings of the mind. If we could obtain access to it we would know but little about it. You must get at the intent in this case, as you do in every case of the kind—from the acts, from the circumstances that surround the matter—and then draw such conclusions as you think ought to be drawn from the facts and circumstances established to your satisfaction; draw such conclusions as to what the intent was. Because it is a lawsuit and because you have taken upon yourselves the oaths of jurors you do not surrender your common sense, your good judgment, your reasoning powers. You carry them into the jury box and everywhere you go; in your jury box, as in your various business relations of life, you are to use them and appropriate the evidence and draw such inferences and conclusions as your good judgment dictates to be drawn from the facts and circumstances.

The first question involved in this indictment is, Did the defendant cut, or cause or procure to be cut, timber upon the mineral lands of the United States, in the county of Pennington, this State, with intent to export it from and out of the State of South Dakota? There are really, you might say, two offenses charged. The question has been raised on that subject, and there is a bill to be submitted to you. That is first for you to determine, Did he cut, or cause or procure to be cut, timber, and, if so, did he do so with intent to export it from the State of South Dakota?

There is no law which permits any person to do that. No person can go upon the public lands, mineral or otherwise, under conditions certainly that apply to this case, so far as we are concerned in the investigation of this matter, and cut and remove timber for the purpose of exporting from the State; certainly not on the mineral lands under the statute which I have read. If you find that he did so cut, cause or procure to be cut, timber with that intent, then you are at

liberty to find the defendant guilty. If you come to the conclusion or fail to find that the Government has established that proposition beyond reasonable doubt, then you should pass that question, because unless you so find you can not convict him of the alleged offense.

Then you turn your attention to the other question which is involved in that indictment. Did he cut any timber, cause or procure it to be cut, on the lands, as therein described, with the intent to dispose of it contrary to the statute and rules as laid down and which I have given you?

I am of the opinion in this case, and so charge you, that it is incumbent upon the prosecution to satisfy you by evidence beyond a reasonable doubt that the defendant did cut, cause or procure to be cut, timber from the mineral lands, as charged in the indictment, with intent to dispose of the same contrary to the statute and the rules prescribed by the Secretary of the Interior; that the burden in this case rests upon the prosecution.

Now, has the Government satisfied you, because it is incumbent upon it to do so, that the defendant cut, or caused or procured to be cut, timber from the lands described in the indictment for purposes other than for building, mining, agricultural, or other domestic purposes? As I understand, the Government has assumed that responsibility and maintains it in this case—claims that the responsibility rests upon it, as I understand from the officers.

You will look this evidence all over and examine it with care. Something has been said about a Black Hills jury. From what I have seen of the men who come to the Black Hills—I have had some experience with them for many long years—I believe, and have so stated many a time, that a case will receive the same careful, honest, and intelligent consideration from them that it would receive from any other part of the State. I dismiss that question. I assume that you feel the same responsibility to do your duty as the court must feel to do his.

Now, you will look this case over, consider it from all the different standpoints, view this evidence, consider and weigh and scrutinize it with care, and reach just such a conclusion as your good judgment dictates. It is for you, under the rules given by the court, to ascertain what the truth is, and when you have ascertained it it is your duty to bring it to light by your verdict.

The Government of the United States comes in here like anybody else. It has no right that the humblest citizen has not, but it, as well as the defendant, is entitled to your good, honest, intelligent judgment.

It is claimed by the prosecution from the evidence that this defendant was manufacturing, and for the purpose of selling lumber to a railroad company; that the defendant was engaged in that business. You take all the subsequent facts as you find them from the evidence; consider them all. For the purpose of getting at the intent you may con-

sider what a man did before and after, to enable you to get at the intent with which he did the act, if at all. The law provides that a railroad company has a right "to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad."

"Also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road," upon the public lands of the United States.

It would not be a violation of the law of the statute for a party to dispose of the timber cut upon the public domain to a railroad company for the purpose named. Now, in order to get at the intent you may consider this matter, whether or not he was selling, or had sold or disposed of in any manner, or was about to sell any lumber to a railroad company for purposes of construction as a road. He would have no right to sell, and the railroad company would have no right to buy, for the purpose of repairs, but for the purpose of construction they have the right. And if a party cut timber from the public lands with the intent to dispose of it to the railroad company for purposes of construction only, that would not be a violation of the law; but with the intent to dispose of it for other purposes than that to be used by the railroad company for other purposes except for construction, it would be a violation.

You take these acts of the defendant after and before for the purpose of coming at the intent with which he cut, or caused or procured to be cut, the timber, if you find he did so, and to that extent you have a right to consider the evidence.

This defendant, in standing on trial in this case, as every defendant in this court, is presumed to be innocent until his guilt is established by the prosecution beyond reasonable doubt. He is permitted to take the stand in his behalf if he chooses to, but is not obliged to, and the fact that he does not take the stand does not militate against him.

The Government is to establish its case by competent proof, and it must be done before any jury can convict him.

Now a reasonable doubt. What is a reasonable doubt? We judges and juries have sometimes had a wrong conception of a reasonable doubt. Judges have many times attempted to define a "reasonable doubt," but it always seems to me that the construction, definition of reasonable doubt was more blind than the terms themselves. I can see nothing obscure in the term. It simply means a reasonable doubt and not an unreasonable doubt. It is a doubt based on evidence or want of evidence in the case. It is not some imaginary doubt, and we can not in the nature of things by human testimony reduce matters to mathematical certainty. We have to deal with reasonable doubt; not imaginary doubt. If after a careful, intelligent comparison and con-

sideration of the entire evidence you would say and feel right in saying that you would not hesitate to act upon it in the most serious affairs of life, then you have no reasonable doubt. If you would so hesitate you have a reasonable doubt.

The questions of fact are for your consideration. You are the exclusive judges of the credibility of the witnesses and of the weight to be given their testimony, and you must consider and determine whether the witnesses have told or intended to tell the truth upon the stand and what their testimony weighs, how much it weighs in enabling you to get at the truth, because that is the purpose of all the evidence, all the law that can be given, to get at the truth so far as the issues are concerned.

If you find the defendant guilty you will say, "We find the defendant guilty as charged in the indictment." If you find him not guilty you will say "Not guilty" by your verdict. In order to relieve you of the trouble of writing out the whole form, both forms will be handed to you by the deputy and you are to use the form in accordance with your verdict.

In regard to selling to the railroad company for purposes of construction, I charge you to mind the statute. The railroad company have a right to take, and I charge you that this defendant would have a right to cut and sell to the railroad company, from the lands adjacent to the line of the railroad, material, earth, stone, and timber necessary for the construction of said railroad; not to be shipped off somewhere else, but adjacent to that line.

NORTHERN PACIFIC RAILROAD COMPANY *v.* LEWIS.

(162 U. S., 366.)

In the above case the United States Supreme Court held as follows:

A person who, without authority, cuts wood from public lands of the United States, not mineral, or purchases such wood so cut, and leaves it, when cut or purchased, upon such public lands near a railroad, has no right or possession of, or title to, or ownership in it, and cannot maintain an action against the corporation owning such railroad for its destruction by fire caused by sparks from locomotives of the company. (See syllabus.)

It also further held therein as follows: If the right to cut is claimed under the act of June 3, 1878 (20 Stat., 88), the burden of proof is on the party so claiming to show the mineral character of the land and his compliance with the rules and regulations of the Secretary of the Interior. "The right to cut is exceptional, and quite narrow, and for specified purposes only. The broad, general rule is against the right. If the plaintiffs had acquired the right by reason of a compliance with the provisions of the statute the facts should have been shown by them. The presumption, in the absence of evidence, is that the cutting is illegal." (U. S. *v.* Cook, 19 Wall., 591.)

UNITED STATES *v.* MILO J. LEGG ET AL.

District court, fourth judicial district, Montana.

INSTRUCTIONS OF COURT.

You are instructed that in a civil action, such as the one at bar, the plaintiffs are only required to prove the material allegations of the complaint, and the issues raised by the pleadings by a preponderance of evidence.

In this territory the public lands of the United States are divided into three general classes, namely, agricultural lands, coal lands, and mineral lands.

1. Agricultural lands are those lands that are capable of being brought under a state of cultivation for the production of grain, grass, or vegetable of any kind that may be grown in this climate, and which are not known to contain any valuable deposits of coal or any of the precious metals, such as gold, silver, lead, cinnabar, or other valuable minerals.

2. Coal lands are those lands which are chiefly valuable for the coal known to exist therein.

3. Mineral lands are those lands which are chiefly valuable for the minerals (except coal) which they contain, and which are more valuable for the minerals therein contained than they are as agricultural lands or for the timber growing thereon. Mineral lands are not subject to entry under the general land laws of the United States, but can only be located and entered as mines and mining claims under the act of May 12, 1872. Upon such lands persons who are citizens and residents of the United States and the Territory may cut and remove therefrom the trees and timber growing thereon for domestic, agricultural, or mining purposes. But this right to cut timber from mineral lands does not give any right to persons to go upon the public coal lands or agricultural lands of the United States and cut and carry away the timber thereon.

4. The authority granted by the act of June 3, 1878, to cut timber applies exclusively to lands which are strictly mineral in character and subject to mineral entry only. The defendant must prove by a preponderance of evidence that such lands are more valuable for the mineral than for any other purpose and that they are not suitable for agricultural purposes or cultivation, or valuable solely for the timber thereon.

5. In this case the burden of proving the character of the land from which this timber was cut or taken by the defendants rests upon the defendants, and unless the defendants have proven by a preponderance of the evidence on that point that the land from which this timber was cut and taken is mineral land and subject to entry only as mineral lands, then they can not justify their entry on said land and the cutting and carrying away of said timber.

6. If you believe from the evidence that the defendants took into their possession and sawed up into lumber and sold any logs which had been previously cut by other persons and had been seized by the United States, and which were still held by the United States, and that the defendants then took them and converted them to their own use, then it is no defense to this action whether said logs were lying on mineral lands or not when they were taken by the defendants and converted to their own use.

7. The court instructs you that if the defendants knowingly went upon the public lands of the United States and cut and carried away and converted to their own use any of the trees and timber growing thereon and sawed the same into lumber and sold it and kept the money therefor, then you should find for the United States the full value of the lumber so cut and sold by the defendants, unless you further find from the evidence that the timber was cut and taken from mineral lands.

8. If you find from the evidence that the defendants were mistaken and unintentional trespassers on the public lands of the United States, and that by mistake they unlawfully cut timber from said lands, not knowing said lands were public lands, then you may find for the United States the full value of the growing trees and the old logs taken by the defendants, unless you also find that the growing trees so found by you to have been cut by the defendants were cut from mineral lands as defined in other instructions, then, in that event, you will find for the United States the value of the old logs only.

9. If you find that the defendants knowingly went upon the public lands and cut and carried away this timber, and that said lands were not by them (defendants) known to be mineral, as defined in these instructions, then you will find for the United States the full market value of the lumber after it had been sawed up by the defendants and the value of the logs in the mill yard that had not been sawed into lumber.

10. The court instructs you that any and all statements made by any of the counsel in this case in reference to what they expected to prove by said record of the United States against Broadwater, Hubbel & Co. is not evidence in this cause and should not be considered by you in making up your verdict.

(Given at defendants' request:)

If the jury believe, from a preponderance of the evidence in this cause, that the paper offered in evidence by the plaintiff has been altered or changed since it was signed by the defendants, then such paper would not be the paper originally signed by the defendants and the jury have a right to exclude such paper from their consideration.

(Given at defendants' request:)

The burden of showing that the trespass was committed (if any is

proven) on the lands of the United States, and not otherwise, by the preponderance of the evidence.

If the jury find from the evidence that the old logs were originally cut and severed from the soil by others than themselves, then as to such logs or timber cut these defendants are not responsible for the original cutting and severing from the soil if the defendants had no connection therewith at the time of cutting. (Given, but with the modification as follows:) But the defendants are liable if you find from the evidence that they unlawfully took such logs after they (the logs) had unlawfully been cut by others.

United States *v.* Lynde et al.

Circuit court, district of Montana (47 Fed. Rep., 297).

* * * * * *

A citizen of the United States and resident of Montana Territory may lawfully cut and remove timber from the public mineral lands for building, agricultural, mining, or other domestic purposes under the statutes of the United States, which provide that all citizens of the United States and other persons, bona fide residents of certain States and Territories, including Montana, are authorized to fell and remove timber growing on public mineral lands, not subject to entry, for building, agricultural, mining, or other domestic purposes, subject to regulations prescribed by the Secretary of the Interior.

See also U. S. *v.* O. A. Dodge, cited on page 180.

RAILROAD COMPANIES CAN NOT TAKE TIMBER FROM PUBLIC LANDS UNDER ACT OF JUNE 3, 1878 (20 STAT., 88).

United States *v.* Eureka & P. R. Co.

Circuit court, district of Nevada (40 Fed. Rep., 419).

Public Lands—Timber—Cut for Use by Railroad Company.

The defendant, a railroad corporation, purchased for use upon its locomotives and cars, wood severed from the public mineral lands. *Held*, that such purchase and use was unlawful, and that the United States could recover from defendant the value of the wood so severed and purchased by it.

TIMBER ON MINING CLAIMS.

Locators of mining claims, so long as they comply with the law governing their possessions, are invested by Congress with the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and it is the duty of the locator to care for his claim should trespass be attempted thereon, since he is concerned for its protection and may undoubtedly maintain suit to that end. (See 1 L. D., 615.)

United States *v.* Levi W. Nelson.

District court, district of Oregon (5 Sawyer, 68).

Mining Ground.

A person occupying a portion of the public land as mining ground under the mining law of the United States is not bound to purchase the same, but until he does so he has a mere license to work the ground for the precious metals therein and has no right to cut or use any timber growing or found thereon, except as the same may be necessary to enable him to mine the same conveniently.

Same.

The defendant occupied 70 acres of public land as mining ground and cut timber from 4 acres thereof in advance of his mining operations and disposed of the same for his own benefit, assigning as a reason therefor that by cutting the timber in advance of the mining operations the stumps would rot and therefore be more easily removed. *Held*, that this cutting was not necessary to the mining operation, and therefore unlawful.

CUTTING TIMBER ON MILL SITES.

A. B. Page.

If such claim be timbered claimant may cut for construction of mill, but not for sale for private gain.

Commissioner McFarland to A. B. Page, Jasper, Colo., March 22, 1883.

Yours of 5th instant received and contents noted. In reply thereto you are advised that any miner holding the possessory right to a vein or lode, or any owner of a quartz mill or reduction works, and not owning a mine in connection therewith, may make location of a mill site, as provided by section 2337, Revised Statutes, and upon complying with the conditions specified therein may obtain patent therefor. The quantity of land embraced in each mill-site claim can not exceed 5 acres, and must be nonmineral in character. If the mill-site claim is timbered there would seem to be no good reason why the lawful claimant should not be permitted to cut and remove the timber thereon for the purpose of constructing a mill, reduction works, tramways, or other accessory required in the development of his mining interests. In permitting the removal of the timber from such mill site or tract of nonmineral land prior to the issuance of patent therefor, it is strictly forbidden to make such timber an article of sale for private gain or speculation, but the same must be used and applied to the actual development of the mining interests of the individual claimant.

TIMBER CUTTING—STATUTORY PROVISIONS.

Instructions.

(24 L. D., 167.)

In construing the provisions contained in the two acts of June 3, 1878, and the act of August 4, 1892, with respect to timber cutting, it must be held that, the first of said acts of 1878 (20 Stat., 88), relates to all mineral lands of the United

States, but to none of any other character, and permits the cutting of timber on such lands for building, agricultural, mining, and other domestic purposes, but not for the purpose of sale or commerce, and that the second of said acts (20 Stat., 89), as amended by the act of 1892, relates to all nonmineral lands of the United States, in all public-land States, and prohibits the cutting of timber on such lands, except as therein otherwise provided.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897.

I am in receipt of your communication of May 25, 1896, asking to be advised as to the proper construction of the acts of Congress of June 3, 1878 (20 Stat., 88), June 3, 1878 (20 Stat. 89), and of August 4, 1892 (27 Stat., 348), all of which contain provisions relating to the cutting of timber on the public lands.

The act of June 3, 1878 (20 Stat., 88), which may be designated as act No. 1, is entitled:

An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes—

and the first section reads as follows:

That all citizens of the United States, and other persons, bona fide residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes; *Provided*, the provisions of this act shall not extend to railroad corporations.

The second section provides that the register and receiver of local land offices in whose district any mineral land may be situated shall ascertain from time to time whether any timber is being cut upon any such land, except for the purposes authorized by said act, and if so, to report the fact to the general land office, and section three provides penalties for the violation of the provisions of the act.

The other act of June 3, 1878, which may be designated as act No. 2, is entitled:

An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

The first section of this act authorizes the sale of public lands in "the States of California, Oregon, and Nevada and in Washington Territory" which are valuable chiefly for timber and stone thereon, but unfit for cultivation; the second and third sections specify the

mode of procedure in such cases, and section four prohibits the cutting of timber on the public lands. It reads as follows:

> That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territory, or remove, or cause to be removed, any timber from said lands with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars: *Provided*, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

The fifth section provides for relief from prosecutions under section 2461 of the Revised Statutes, and the sixth section repeals all acts or parts of acts inconsistent with the provisions of this act.

The third act spoken of in your letter is that of August 4, 1892 (27 Stat., 348), and is entitled:

> An act to authorize the entry of lands chiefly valuable for building stone under the placer-mining laws.

The first section of this act provides for the entry of lands chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims, and the second section, which relates to the subject now under consideration, reads as follows:

> That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, and Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land States.

The proper construction of the two acts of June 3, 1878, was considered by the United States Circuit Court in the case of United States *v.* Smith (11 Fed. Rep., 487), particularly as to their operation within the State of Oregon. It was there held that act No. 2 was operative in that State to the exclusion of act No. 1. It was said in the course of that decision that the provision in act No. 2, making it unlawful to cut any timber on any public land in Oregon, except that cut by a miner or agriculturist in the ordinary working or clearing of his mining claim or farm is inconsistent with and repugnant to the license to cut contained in act No. 1, and that both provisions could not be in full force in the same place. This decision was cited in the decision in

United States *v.* Benjamin (21 Fed. Rep., 285), and it was held that the provisions of the act (No. 1) authorizing the cutting of timber on the public lands was not applicable to California.

These decisions were rendered on April 21, 1882, and August 18, 1884, respectively. This Department on May 25, 1882, considered a number of cases of trespass in cutting timber on mineral lands in the Territory of Dakota, and gave certain instructions in the case of Frank P. Hardin et al. (1 L. D., 597). Secretary Teller then said:

> The act of Congress approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber from the public domain for mining and domestic purposes," clearly authorizes the cutting of timber on the mineral lands of the United States for domestic use. * * *
>
> It has been alleged that the act of June 3, 1878, does not apply to persons cutting timber on the mineral lands for sale, and that to enable any person to have the benefit of that act he must cut the timber for his *personal* use, and not for sale. Such a construction defeats the very intent of the act, which was to allow the settler on the mineral lands to have the benefit of the timber thereon growing for use within the Territory or State where it grew.

The purpose and scope of the act were discussed at some length, and the conclusion reached is that expressed in the foregoing quotation. These views were incorporated in a circular upon said act issued by your office June 30, 1882, and approved by this Department (1 L. D., 697), it being said:

> All citizens and *bona fide* residents of the States and Territories mentioned therein are authorized to fell and remove, or to purchase from others who fell and remove, any timber growing or being upon the public mineral lands in said States or Territories: *Provided*—
>
> 1. That the same is not for export from the State or Territory where cut.
> 2. That no timber less than eight (8) inches in diameter is cut or removed.
> 3. That it is not wantonly wasted or destroyed.

The attention of this Department was in that same year specifically directed to the apparent conflict in the provisions of said acts of June 3, 1878, by a letter from your office requesting instructions in regard to the administration thereof. In departmental letter of August 7, 1882 (1 L. D., 600), it was held in substance that the words "all other mineral districts of the United States" appearing in act No. 1 brought within the provisions of said act not only the mineral lands in the States and Territories named but also those in all mineral districts outside such States and Territories, it being specifically said that "all privileges granted to inhabitants of mineral districts of the States and Territories named in the act were granted to the inhabitants of such mineral districts of California." It was held that the two acts could apply in the same State upon the theory that act No. 1 related to mineral lands and to that class of lands only. That this was recognized as the proper construction is further evidenced by a circular of October 12, 1882 (1 L. D., 695), wherein it was said that

the cutting of mesquite on the public mineral lands of the United States was allowable under the provisions of said act No. 1, while the cutting of such trees upon nonmineral lands was prohibited. This holding seems to have been modified to a certain extent by later circulars. In the circular of May 7, 1886 (4 L. D., 521), it is said in regard to act No. 1—

> The act applies only to the States of Colorado and Nevada and to the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, and Montana and other mineral districts of the United States not specifically provided for, and does not apply to the States of California or Oregon nor to the Territory of Washington.

That is, act No. 1 was held to apply to mineral lands in all States and Territories therein mentioned, also to all mineral districts outside of the States specifically named in act No. 2, but not to mineral lands in the States expressly named in act No. 2, except those in Nevada, which is named in both acts.

Further on in this circular it is said:

> Fourth. Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes.
>
> All cutting of such timber for sale or commerce is forbidden. But for building, agricultural, mining, and other domestic purposes each person authorized by the act may cut or remove for his or her own use, by himself or herself, or by his, her, or their own personal agent or agents only.

The two acts of 1878, having been passed upon the same day, should be treated as one act and so construed, if possible, as to give each provision of each act effect.

Act No. 1 permits the cutting of timber for certain purposes upon mineral lands of the United States in the "States of Colorado or Nevada or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana and all other mineral districts of the United States," and act No. 2 prohibits the cutting of timber on any lands of the United States in "the public-land States," with the proviso, however, that nothing therein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim or preparing his farm for tillage, or from taking the timber necessary to support his improvements. This statement presents the apparently conflicting provisions of the two laws, the existence of which necessitates construction. If the conclusion of the circuit courts, as announced in the decisions hereinbefore cited, that the two acts can not operate in the same place, is to be accepted as correct, then it will be necessary to determine which of the two is to prevail.

This Department has held, however, that both acts apply in Nevada, and if this holding is to be adhered to it would necessarily follow that both acts are to be held operative in the other public-land States brought within the provisions of act No. 2 by the amendatory act.

This rule, so long followed in the administration of these laws, should not be changed unless it is clearly erroneous. It has been the policy to regard the mineral lands in a different light from other public lands of the United States, and the result has been a separate and distinct system of laws in relation to them. It was evidently this consideration that led to the conclusion by the Department that the two acts might stand and both have effect in the same State. This theory seems to be the only reasonable one to explain the enactment of two laws upon the same day which are apparently contradictory. This construction gives effect to both laws, allowing to each operation in its peculiar sphere, and should be adhered to if there be nothing to show a contrary intention upon the part of Congress.

The statement in instructions of April 7, 1887 (1 L. D., 600), in regard to act No. 2—

> By the express provision of section 2 the mineral lands in the broadest sense of that term are excluded from the provisions of said chapter—

is true because the primary object of that legislation was to provide for the sale of lands that were not mineral in character and were at the same time unfit for agricultural purposes. It may be said the insertion of the provision in said act allowing the cutting of timber upon mining claims negatives the proposition that the general prohibition against cutting was not intended to apply to mineral lands. There is some force in that statement, but the inference has not sufficient weight to overcome the other express statements.

In the instructions issued under act No. 1, June 30, 1882, it was held that timber might be cut from mineral lands for sale to citizens and *bona fide* residents of the States and Territories named in said act. In the instructions of May 7, 1886, the cutting of timber for sale or commerce was forbidden, but in those of August 5, 1886, the right to cut timber for sale was recognized. I can not agree with this latter position. The express provision is that timber may be cut "for building, agricultural, mining, or other domestic purposes." If it had been intended to make the timber on the public lands an article of trade and commerce there should have been inserted therein such a provision as "or for sale to *bona fide* residents for such purposes."

The license given under this provision is in derogation of the rights of the public, and must therefore be strictly construed and limited to the cases clearly and unequivocally specified in the act. The words used do not include a license to cut timber for the purpose of sale, and such a license can not properly be included by implication.

The proper construction of these laws would seem to be No. 1 relates to all mineral lands of the United States, but to none of any other character, and permits the cutting of timber on such lands for building, agricultural, mining, and other domestic purposes, but not for the purpose of sale or commerce, while act No. 2, as amended by

the act of 1892, relates to all nonmineral lands of the United States in all public-land States, and prohibits the cutting of timber upon such lands, except as therein otherwise provided.

The effect of this act No. 1 as construed by the Department having, as you state, "resulted in wholesale devastation of timber on such lands for purposes of speculation and personal gain." affords sufficient reason for reconsidering the matter for the purpose of correcting the evil if possible. Furthermore, a change of the ruling as to the construction of said act could not affect any vested rights, as it would simply operate as a revocation or limitation of the unrestricted license to cut, recognized under the construction heretofore given said act. There seems therefore to be good reasons for changing the instructions under said act, and no valid reason against such action at this time.

You will at once prepare instructions in accordance with the views herein set forth to take effect upon such future date as may seem proper, and submit the same for approval.

TIMBER CUTTING—MINERAL LANDS.

INSTRUCTIONS.

(29 L. D., 349.)

The act of June 3, 1878 (20 Stat., 88), with respect to timber cutting on mineral lands, applies to the States of Colorado, Nevada, Montana, Idaho, Wyoming, North Dakota, South Dakota, and Utah, the Territories of New Mexico and Arizona, and all other mineral districts of the United States.

Secretary Hitchcock to the Commissioner of the General Land Office. December 14, 1899.

The Department has again considered the circular of instructions of March 18, 1897, in relation to the cutting of timber on mineral lands, and also your recommendation as to changes to be made therein.

The change suggested relates alone to the territory to be affected by the act of June 3, 1878 (20 Stat., 88).

The circular approved March 18, 1897, but never promulgated, provides upon this point as follows:

The act applies to the States of Colorado, Nevada, Montana, Idaho, Wyoming, North Dakota, South Dakota, and Utah, and the Territories of New Mexico and Arizona, and all other mineral districts of the United States.

You propose to substitute for this paragraph the following:

The operation of the act does not extend beyond the States and Territories specifically named therein, viz: The States of Colorado, Nevada, Montana, Idaho, Wyoming, North Dakota, South Dakota, and Utah, and the Territories of New Mexico and Arizona, since the phrase "other mineral districts of the United States," used in the act, having no definite signification, is incapable of local application, and, consequently, fails to have any effect for want of certainty.

In regard to this change, and referring to the construction given by the former circular, you say:

> While the wording of the act is, doubtless, susceptible of this construction, the result of expanding the operation of the act beyond the States and Territories specifically named therein on the strength of so vague and altogether undefined phrase as "mineral districts," will be to render it *practically impossible to administer* the law in those States and Territories in which it becomes operative under this term, since it will be impossible to distinguish as to which lands in such States and Territories are to be recognized as constituting "mineral districts." In the opinion of this office, this phrase is incapable of definite local application.

To adopt your recommendation would be to say that the words "and all other mineral districts of the United States" are surplusage and of no effect. Such action would be obnoxious to the well-settled rules of construction, which require that effect shall be given to every word of a statute, if possible. As said by you, the words in question are susceptible of the construction given them in the former circular.

Furthermore, the fact that difficulty may be met with in practically administering a law is not usually safe ground for ignoring a provision thereof.

The second section of said act indicates that effect was intended to be given said phrase, and at the same time points out with some degree of clearness that all mineral lands are to be considered as within the purview of said act. Said section contains the following:

> That it shall be the duty of the register and receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective districts.

Accepting this provision as explaining and defining the term "other mineral districts," it materially lessens if it does not entirely obviate the difficulties referred to in your letter.

I agree with you that it is not necessary to include in this circular a reference to the act of March 3, 1891 (26 Stat., 1093), providing for permits to cut timber on public timber lands in certain States. That act has a well-defined purpose and scope of its own, and it was not intended by this circular to affect its operation therein.

It does not seem necessary to go into a fuller discussion of the questions involved, as they were all quite fully gone into by my predecessor when first submitted. (24 L. D., 167.)

I concur in the conclusion then reached, and am of opinion that the circular approved March 18, 1897, is correct. You will therefore make such modifications as to the date when it shall take effect as may be necessary to give due notice thereof, and as so modified it will be approved preparatory to its promulgation.

United States *v.* English et al.

Circuit court, district of Oregon, April 4, 1901 (107 Fed. Rep., 867).

1. Public Domain—Cutting and Removal of Timber—Acts Authorizing—Construction.

   The act of June 3, 1878, authorizing citizens and residents of the States of Colorado, Nevada, and the Territories, and "all other mineral districts of the United States," to fell and remove timber on the public domain does not apply to the State of Oregon, there being no such mineral district.

2. Same—Act Prohibiting—Construction—Cutting for Use in Quartz Mill.

   The proviso to the act of June 3, 1878, §4, prohibiting the cutting and removal of timber on the public domain, provides that it shall not prevent any miner from clearing land in working his claim, or from taking timber to support his improvements. *Held*, that the taking of the timber for use in a quartz mill adjacent to the land from which it was cut was not within the proviso, and hence was prohibited by the act.

3. Same—Question of Willful Trespass—Imposition of Penalty.

   As the unlawfulness of cutting for use in a quartz mill adjacent to the lands from which it is taken is fairly open to question, under the act (the precise question never before having been decided), a cutting for such a purpose will not be held to be willful, and hence the penalty prescribed therefor will not be imposed, but the trespassers will be held liable only for the actual value of the wood in the trees.

Bellinger, *District Judge:*

This is an action by the United States to recover the value of 1,684 cords of wood alleged to have been unlawfully cut upon the public domain. The wood was used by the defendants in their quartz mill, at what is known as the "Golconda mill" in eastern Oregon. Two defenses are made: First, that the wood was cut from some placer mining claims owned by the defendants in the vicinity of their mill, preparatory to the working of such claims; and second, that the defendants have a right to take from the public domain wood necessary in the conduct of their milling business.

As to the first of these defenses, I am satisfied that defendants are not the owners, in good faith, of the alleged placer claims, and that the title so asserted is a mere pretense to justify taking the timber from the land claimed as placer-mining ground.

By the act of June 3, 1878, which is entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes," it is provided:

> That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either

of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

Upon the argument it was claimed that the defendants were entitled under this act to cut the timber in question. But this act does not in terms apply to the State of Oregon; and it has been held that the phrase "other mineral districts of the United States" is not intended to include the State of Oregon, there being no such mineral district. (U. S. *v.* Smith (C. C.), 11 Fed. Rep., 487; U. S. *v.* Benjamin (C. C.), 21 Fed. Rep., 285.)

The question of defendants' liability depends upon the construction to be given to another act of Congress, approved June 3, 1878, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory." Section 4 of this act is as follows:

That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territory, or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars: *Provided*, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

It is contended for the defendants that this is a case of the taking of timber from the public domain necessary to support their improvements, and that it is within the proviso of this section just quoted. The Land Department by its instructions interprets the proviso in this act to authorize the taking of timber not only from the mines and farms of the agriculturist and miner, but when the required quantity is not obtainable therefrom, from other public lands near by. It is clear, I think, that taking timber from public lands for the use the defendants made of this wood is not to support improvements, within the meaning of the proviso of section 4 of the act of 1878. The use that is here made of this timber is for the conduct of a permanent business. The use is not an improvement. It is not in support of, and has nothing to do with, an improvement. In the case of U. S. *v.* Hacker (C. C.), 73 Fed. Rep., 292, it is held that an indictment under this section which does not allege that the defendant intended to export or dispose of the timber cut upon public land is fatally defective. The

court was of the opinion in that case that the phrase "with intent to export or dispose of the same" has reference not only to the removal of the timber, but to the cutting of it; and it seems to follow from this ruling that the cutting, or procuring to be cut, of timber, or its removal, is not a crime, unless what is done is with the intent to export or dispose of the same. And it is argued in defendants' behalf from this that these defendants are authorized to cut timber, or procure it to be cut, from the adjacent public lands, for use in their quartz mill. It would seem from the construction that has been given to this statute that the act of the defendants is within neither the proviso which authorizes the taking of timber, nor the prohibition of the section which makes the taking a crime. In other words, the timber in this case was not cut for export or sale, nor was it taken by the miner for the necessary support of his improvements. Nevertheless, I am of the opinion that this section must be given such a construction as will prohibit the taking of timber from the adjacent public lands by a miner or agriculturist in any case not within the proviso in this section. The statute is intended to preserve the timber upon the public domain against the cutting or taking for any purpose other than that of clearing the land of the agriculturist, or in the ordinary working of the mining claim of the miner, or for the purpose of supporting the necessary improvements of each, and this is not such a case.

The testimony in the case shows that the value of the wood in the tree was 50 cents per cord. When cut it was worth on the ground $1.50 per cord, and at the mill $3. I am of the opinion that the acts of the defendants were not willful. They cut and hauled this wood away in the belief that under the law they had a right so to do. The provision in section 4 of the act of 1878, by which the unlawfulness of timber cutting is made to depend upon an intention to export and dispose of the same, leaves it fairly open to question, notwithstanding the provisos which follow, whether timber may not be cut for use at a quartz mill located on lands adjacent to those from which the timber is cut. The precise question has never before been decided, so far as I am advised; and, in the absence of a decision adverse to such a claim, I am not disposed to hold the conduct of the defendants willful in cutting the timber in question. The total amount cut is 1,684 cords, for which the defendants should be charged at the rate of 50 cents per cord.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 15, 1900.

SIR: I have received your letter of the 13th instant in reply to office letter of the 1st ultimo, relative to the right of persons operating smelters in Coconino County, Ariz., to take timber from the

public lands for the purpose of manufacturing charcoal to be used in smelting.

It was held in said letter that smelting is not mining, and that timber can not be taken from public mineral lands under the act of June 3, 1878, for smelting purposes. In support of the ruling you were referred to the circular of January 18, 1900, containing rules and regulations governing the use of timber on public mineral lands, and to a decision rendered October 11, 1887, by then Secretary Lamar.

In your said letter you contend that the decision of 1887 should not be held to apply to the smelter for which you desire to secure timber, as the facts differ very materially from the facts in the case under consideration by Secretary Lamar when said decision was rendered. You further contend, if it be held that smelting is not mining, and that you have no right to take timber from mineral lands for smelting, that you should be allowed, under the act of March 3, 1891, and the rules and regulations thereunder, contained in the circular of February 10, 1900, to take timber from nonmineral public lands for smelting under the clause which allows the free use of timber for manufacturing.

In reply to your said letter, with reference to the first contention it is only necessary to state that the rules and regulations governing the use of timber on mineral lands, approved by the honorable Secretary on January 18, 1900, provide in specific terms that—

> No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.

These regulations are binding on this office, and I must therefore adhere to the position taken in said letter of August 1, 1900.

Section 3 of the circular of February 10, 1900, containing rules and regulations governing the use of timber on nonmineral public lands in certain States and Territories, under the act of March 3, 1891 (26 Stat., 1093), as extended by the act of February 13, 1893 (27 Stat., 444), provides that—

> Settlers upon public lands and other residents of the States and Territories above named may procure timber free of charge from unoccupied, unreserved, nonmineral public lands within said States and Territories, strictly for their own use for firewood, fencing, building, or other agricultural, mining, manufacturing, or domestic purposes, but not for sale or disposal, nor for use by other persons, nor for export from the State or Territory where procured. The cutting or removal of timber or lumber to an amount exceeding in stumpage value $50 in any one year will not be permitted, except upon application to the Secretary of the Interior and after the granting of a special permit.

The question then arises, is not a resident of the Territory of Arizona, which is one of the Territories to which said act applies, entitled to take timber from nonmineral public lands under the permission to take it for "manufacturing or domestic purposes?"

You ask if it is not manufacturing when crude copper ore with rock and earth and iron is put into a smelting furnace, the metallic copper extracted therefrom, and then and there made into copper bars, and I am inclined to the opinion that it is. However, if it should be held that smelting is not manufacturing, I am still of the opinion that timber used for smelting should be held to have been taken for "domestic purposes," which is allowable.

It is observed that the act of June 3, 1878, under which it is held that timber may not be used for smelting, authorizes its use for "building, agricultural, mining, or other *domestic* purposes," but said act appears to have been treated with special reference to its effect on mining, and in the decision of 1887, above, which has been since followed, the only question considered appears to have been whether smelters are entitled to timber because smelting is mining.

The act of March 3, 1891, appears to have been passed with a view to promoting domestic industries of all kinds in the States and Territories to which it applies, and it should be given a broader interpretation than was given the act of June 3, 1878.

I am of the opinion, therefore, that timber may be taken for smelting from nonmineral public lands in the States and Territories to which said act applies, under the rules prescribed in said circular of February 10, 1900.

Attention is called to the fact that it is not allowable to take timber in any one year of the stumpage value of more than $50, except upon application to the Secretary of the Interior and the granting of a special permit.

Very respectfully,

W. A. Richards,
Acting Commissioner.

Mr. Thos. F. Noonan, Jr.
Jersey City, N. J.

United States *v.* Isaac Van Winkle.

United States district court, District of Idaho.

INSTRUCTIONS OF COURT.

If I am not mistaken, there is more or less sentiment among the people in this country that the Government is somewhat oppressive in its timber laws and regulations.

That is a mistaken view wherever it may be entertained. A moment's reflection will convince us that if no restraint were made the timber of the country would quickly disappear, and, in many cases, would be wantonly destroyed.

The law is intended to permit its present necessary use to the peo-

ple and at the same time prevent its wanton destruction, and, as far as possible, preserve it for future use.

Congress has from time to time enacted such laws as it deems best to meet the needs of all the people, and without a desire to oppress any. As you have learned during the trial, Congress on June 3, 1878, enacted a law concerning timber especially applicable to the mining sections. Considering the entire act it would seem to have been intended for the development of the mining industry. While providing for the use of timber in the mining districts for mining purposes, it also provides for its use for other industries, but it was contemplated that wherever the mining industry prospered all the other industries referred to in the law would spring up, and that timber for other use would be as necessary as for mining purposes; hence the same law provided for all, but only in mining districts.

The statute referred to provides that all citizens and *bona fide* residents of certain States and Territories, including Idaho, and in all other mineral districts in the United States, are authorized to cut and remove for building, agricultural, mining, and other domestic purposes any timber or other trees growing or being upon public lands, said lands being mineral and not subject to entry under existing laws of the United States, except for mineral entry, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon said lands, and for other purposes.

You will observe that:

1. Only citizens or residents are allowed this privilege.

2. That the timber can be cut only for domestic use—that it can not be exported from the State.

3. That it can be cut only upon mineral lands. And

4. That it must be done according to the rules prescribed by the Secretary of the Interior.

In this case there is no question that the defendant is a citizen and resident, and that the timber was cut only for domestic use, leaving the two other questions for consideration, the most important of which is whether the land from which the timber in question was cut was mineral within the meaning of the law.

It is evident from a glance at the law that it was intended as a means of affording the necessary supply of timber for the use of the inhabitants of the mining countries, and any narrow or limited construction which would prevent such result would be contrary to the spirit of the law. In this connection it must be borne in mind that mining operations require a very large amount of timber. To limit the cutting to the small area or spots upon which mineral is actually found would make it an entirely useless law. Neither will it do to hold that

it applies only to those lands which have been actually located as mineral claims, for the timber on those belonging to their owners would not be available to other citizens; hence, with either of these constructions, the law would make available very little timber to the class of people referred to. The only reasonable construction that can be given is that it meant to make, as a timber supply in a mining country, all the timber in a mining camp or district which is within the vicinity or within such distance of known or actually discovered ore-bearing ground as to make it available for use at such places. This would include all timber in the neighborhood of mines, or within such distance from them as to make it convenient for their use, whether mineral is actually found in the ground or not. I add another rule of determination—that is, all ground or country of such character, and so situated with reference to other lands known to contain mines, that miners would prospect it with the expectation of finding mines. Certainly a body of timber land without any surface mineral indications, and situated so far from a known mineral section that it could not be considered a part of it, could not be held mineral until the actual discovery of mineral in it.

You must take these definitions which I have given you, and in connection with the testimony, determine whether the land on which the defendant cut the timber in question was mineral or not. If you conclude that it is not mineral, the defendant had no right to cut timber thereon, and is liable to the Government for its value; if you conclude it is mineral, he had a right to cut it and is not liable, provided he complied with the rules and regulations of the Secretary of the Interior above referred to.

Such rules being authorized by law, they are as valid as the law itself, provided they are not contradictory of but are in harmony with it. The rules in force when the timber was cut provide, among other things, that a mill man must keep books to show to whom he disposed of lumber, and he must require certain statements from purchasers, all of which was intended to prevent the exportation of lumber. While the defendant did attempt compliance with some of the rules, there is no evidence that he complied with these or attempted to do so. This rule, it seems, was abrogated by the present Secretary of the Interior soon after the cutting referred to in this case was done, and it has been argued that defendant should be adjudged by the new rules instead of the old. Of course it is evident that the present Secretary considered the old rule wrong or he would not have set it aside. There is, however, no intimation that cases which occurred under the old rules might be settled according to the milder new rules. Certainly in law all cases must be determined by the rules and law in effect when the facts making the cases occurred, and the courts must so enforce the rules.

You are therefore instructed that as the defendant failed to comply with the rules in force at the time of the cutting, he is liable to the Government for the timber cut.

The question remains to determine for what amount or by what rule the amount must be fixed. It is the law that when a trespasser in cases of this kind commits a trespass willfully—that is, knowing that he is in the wrong, he must pay the full value of the timber or lumber as it was at the time it is found in his possession and claimed by the Government, without allowing him anything he has added to the value of the timber by his labor; but when he has acted in good faith and under the belief that he had a right to take it, he is to be charged for the timber at its value as he found it standing on the land.

You must judge from the testimony whether the defendant acted in such good faith or not, and find your verdict according to your conclusion from his testimony.

United States *v.* Richmond Mining Company.

Circuit court, district of Nevada, November 23, 1889 (40 Fed. Rep., 415).

Public Lands—Right to Timber Cut for Mining Purposes.

The defendant, a corporation engaged in mining, reducing ores, and refining bullion, purchased wood and charcoal for use at its reduction works. The cord wood, and the wood from which the charcoal was manufactured, were cut upon unsurveyed public lands, mineral in character, of little or no value except for the mineral therein, and within organized mining districts, or not far remote from known mines. *Held*, that this was mineral land within the meaning of the act of Congress of June 3, 1878, permitting timber to be taken therefrom for "building, agricultural, mining, or other domestic purposes;" and that defendant could lawfully purchase such wood and coal for said use under the license given by said act. (Syllabus by the court.)

United States *v.* Edwards.

District court, district of Colorado, June 12, 1889 (38 Fed. Rep., 812).

Public Lands—Mineral Lands.

Land returned on the Government survey as mineral land, of broken and rugged surface, with every indication of mineral ground, but on which no mines have been located, though in the vicinity of valuable mines, and which is unfit for cultivation and entry as agricultural lands, is within the meaning of act of Congress of June 3, 1878, allowing timber to be taken from the mineral lands on the public domain for building, agricultural, mining, or other domestic purposes.

United States *v.* Price Trading Company et al.

Circuit court of appeals, eighth circuit (109 Fed. Rep., 239).

* * * * * * *

Cutting of Timber from Mineral Lands—Regulations Governing.

The regulations prescribed by the Secretary of the Interior, under and pursuant to act June 3, 1878 (20 Stat., 88), authorizing the cutting of timber from public mineral lands in certain States and Territories for building, agricultural,

mining, or other domestic purposes, which regulations require "every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this act," to keep a record showing by whom such timber was cut, from what lands, evidence of mineral character, to whom the timber was sold and for what purpose, etc., and to take from each purchaser a written certificate under oath, that the purchase is made for his own use, and for an authorized purpose, contemplate the keeping of such records only by persons who, like the proprietors of sawmills, make a business of cutting timber on mineral lands and selling it, or who are engaged to a considerable extent in such business, and they do not apply to settlers engaged chiefly in other pursuits, who cut small quantities of timber from mineral lands which they occupy, and who barter the same to a trader, with the understanding that it will be resold to other farmers or ranchmen in the vicinity for domestic uses, so as to render such cutting or sale unlawful, although the prescribed conditions are not complied with. Sanborn, circuit judge, dissenting.

SAME—STATUTE GIVING RIGHT TO CUT TIMBER FROM MINERAL LANDS—REPEAL BY IMPLICATION.

The right, given by act June 3, 1878 (20 Stat., 88), to citizens of the States of Colorado and Nevada, and the Territories, excepting Washington, to cut timber from public mineral lands for certain domestic purposes, was not affected by the act of the same date (20 Stat., 89) for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory, and which prohibited the cutting of timber on any public lands in those States and Territory with intent "to export or dispose of the same," as amended by act of August 4, 1892 (27 Stat., 348), by striking out the names of the States and Territory therein named and inserting in lieu thereof the words "public-land States." The first act was special, and designed for the benefit of the residents of States and Territories in many parts of which timber is scarce, and the amendment to the second act must be construed as authorizing the sale of timber lands in all other public-land States, and not as repealing by implication the privileges conferred by such special act.

* * * * * * *

PUBLIC LANDS—ACTION FOR UNLAWFUL CUTTING OF TIMBER—DEFENSE.

To sustain a defense to an action by the United States to recover the value of timber conceded to have been cut from public lands, and which was purchased by defendant from sundry persons who cut the same, on the ground that the cutting was authorized and lawful, under act June 3, 1878 (20 Stat., 88), and the regulations prescribed by the Secretary thereunder, the defendant must prove (1) that the choppers who felled and removed the timber were bona fide residents of the State; (2) that the land from which it was cut was of strictly mineral character; (3) that such land was not subject to entry under existing laws of the United States, except for mineral entry; and (4) that the choppers sold the timber to citizens and bona fide residents of the State for the legitimate use of such purchasers for building, agricultural, mining, or other domestic purposes. Each of these facts is essential to such defense without regard to whether rule 4 of the regulations requiring a record to be kept is applicable to the case, and the erroneous direction of a verdict for defendant in such a case can not be held without prejudice, where the evidence in the record leaves a question for the jury upon either one of such facts. Per Sanborn, circuit judge, dissenting.

OPERATION OF THE ACT OF JUNE 3, 1878 (20 STAT., 88) DISTINGUISHED FROM THAT OF THE ACT OF JUNE 3, 1878 (20 STAT., 89).

UNITED STATES *v.* SMITH.

Circuit court, district of Oregon (11 Fed. Rep., 487).

TIMBER ON PUBLIC LANDS IN OREGON.

The act of June 3, 1878 (20 Stat., 88), giving permission to the residents of Colorado, Nevada, the Territories, "and other mineral districts of the United States," to cut timber for certain purposes upon the mineral lands therein, does not apply to Oregon, but the subject of cutting timber on the public lands within such State is regulated by the act of the same date (20 Stat., 89), providing, among other things, for the sale of timber lands therein.

MINERAL DISTRICT.

This term, as used in the first of the said acts of June 3, 1878 (20 Stat., 88), has no application to Oregon, there being no such division or district of the State established either by law or common reputation.

See decision in full, cited on page 107.

UNITED STATES *v.* BENJAMIN.

Circuit court, district of California (21 Fed. Rep., 285).

PUBLIC LANDS—CUTTING TIMBER ON MINERAL LANDS IN CALIFORNIA—ACT OF JUNE 3, 1878, CHS. 150 AND 151.

Timber upon mineral lands in the State of California is protected and governed by the provisions of the act of June 3, 1878, chapter 151 (20 Stat., 89), made specifically applicable to that State, and not by the general provisions of chapter 150 of the act of June 3, 1878 (20 Stat., 88), which can only operate upon "mineral districts," if any there be, not specifically provided for by designating the particular State or Territory in which it is situated by name.

See decision in full, cited on page 112.

TIMBER AND STONE LAND ACT.

[Act of June 3, 1878, Chap, 151; 20 Stat, 89.]

AN ACT for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as

timber lands: *Provided*, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication at the expense of such applicant, in a newspaper published nearest the location of the premises, for a

like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

SEC. 4. That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territory, or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars: *Provided*, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

SEC. 5. That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: *Provided*, That

nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: *And further provided*, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

SEC. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

This act was made applicable to all the public land States by the act of August 4, 1892 (27 Stat., 348.)

[Act of August 4, 1892; 27 Stat., 348.]

* * * * * * *

SEC. 2. That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land States.

SEC. 3. That nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one.

UNITED STATES *v.* WILLIAMS AND OTHERS.
UNITED STATES *v.* WILLIAMS AND ANOTHER.

Circuit court, district of Oregon (18 Fed. Rep., 475).

CUTTING TIMBER ON THE PUBLIC LANDS.

Section 4 of the act of June 3, 1878 (20 Stat., 89), prohibits the cutting of any timber on the public lands with intent to dispose of the same; but the proviso thereto permits a settler under the preemption and homestead acts to clear his claim as fast as the same is put under cultivation, and the timber cut in the course of such clearing may be disposed of by the settler to the best advantage.

SAME.

But if such settler cuts timber on his claim with the intent to dispose of the same, and not merely as a means of preparing the land for tillage, he is a willful trespasser, and is liable accordingly.

DAMAGES FOR CUTTING TIMBER.

The measure of damages in an action for cutting timber on the public lands, in case the trespass is inadvertent and not willful, is the value of the timber in the tree; but where the trespass is willful, the value of the labor put upon it by the trespasser must be added to the value in the tree, with interest thereon in either case.

TRESPASS BY MISTAKE.

The defendant claimed to have taken up a homestead on the northwest quarter of section 22 of township 19, and, while intending to cut saw logs thereon, with intent to dispose of the same, did, by mistake, cut said logs on the northeast quarter of said section. *Held*, that if the defendant had cut the logs on the northwest quarter, as he intended, it would have been a willful trespass, and therefore his mistake was immaterial, and he was liable to the United States for the value of said logs as a willful trespasser.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 2, 1896.

SIR: By reference from the Department, I am in receipt of your letter of May 14, 1896, addressed to the honorable Secretary of the Interior, and requesting reply to the following questions:

1. Have we the right to take timber from Government land to satisfy the requirements of our flumes and mines?

2. Have we the right to cut logs for miners owning claims in the neighborhood and to receive toll therefor?

You are advised that under the proviso to section 4, act of June 3, 1878 (20 Stat., 89), the miner is authorized to cut the timber necessary to be cut in clearing his land in the ordinary working of his mining claim, and to support his improvements. The proviso limits the cutting on the public lands to that done by a miner or agriculturist on his claim and for two purposes, viz, to enable him to work his claim for mining or farm purposes and to supply himself with the timber needed for his improvements. It does not license any cutting on the public lands beyond the limits of a mining or homestead claim, for the purposes above mentioned or for any other purpose.

Therefore it appears that you have no right to take timber from vacant Government land to supply your flumes and mines.

In reply to your second inquiry, you are advised that miners have the right to employ others to cut for them such timber as, and above stated, they are authorized to cut either for clearing or for improvements, and they may receive in exchange for timber so cut lumber to be used for the improvements for which the said timber was cut.

It therefore appears that you may negotiate with a miner or agriculturist to cut for him the timber necessary to be removed from his claim in the ordinary adaptation of it to mining or for farm purposes, or the timber needed for improvements.

The timber cut for clearing in the ordinary working of a mining claim or preparing a homestead claim for tillage may be sold for money. The timber cut for improvements may be exchanged for the lumber needed and to be applied to such improvements.

Very respectfully,

E. F. BEST,
Acting Commissioner.

Mr. W. E. COUL,
Applegate Water Company, Jacksonville, Oregon.

PAYMENT OF $2.50 PER ACRE, UNDER SECTION 5 OF THE ACT OF JUNE 3, 1878 (20 STAT., 89), ONLY RELIEVES FROM CRIMINAL LIABILITY.

UNITED STATES *v.* SCOTT ET AL.

Circuit court, northern district of California (39 Fed. Rep., 900).

PUBLIC LANDS—CUTTING TIMBER—PAYMENT FOR LAND.

A party prosecuted for cutting timber on the public lands under section 2461, Revised Statutes, is only relieved from the criminal prosecution and liabilities provided for in said section 2461 by payment of $2.50 per acre for the land on which it is cut, in pursuance of the provisions of the act of 1878 (1 Supp. Rev. Stat., p. 329, sec. 5); he is not relieved from his civil common-law liability to the United States as owner of the land for the value of the timber cut.

SECTION 2461, U. S. R. S., NOT REPEALED BY THE ACT OF JUNE 3, 1878 (20 STAT., 89).

DEPARTMENT OF THE INTERIOR,
Washington, D. C., September 24, 1878.

SIR: I have the honor to transmit herewith a copy of a telegram received from Special Agent Hobbs, dated San Francisco, Cal., June 21, 1878, in which he states that the United States attorney says: "The repeal of the old timber law leaves no criminal statute in force under which a party may be prosecuted for past offenses, unless suits are already commenced." I also transmit copy of the rules and regulations adopted by this Department in accordance with the provisions of two certain acts of Congress approved June 3, 1878, in relation to the sale and disposal of timber lands, and the punishment for depredations thereon. (Pamphlet Laws for 1877–78, pp. 88, 89, 90, 91.)

These acts provide for the sale and disposal of timber lands, and also specify in what cases prosecutions shall be brought for depredations thereon in the future. The fifth section of the act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," provides for the settlement of cases prosecuted under section 2461 of the Revised Statutes. I do not understand, however, that either of said acts was intended to repeal section 2461, nor in any manner to affect the prosecution of persons for depredations already committed, except as therein specified. While it is true section 5 of the act prescribes a rule for settlement, this does not necessarily, nor in fact, take away the right of the Government to prosecute persons who have trespassed upon the public lands. Should you agree with me in these conclusions, I have the honor to recommend that you will instruct the United States attorney for the State of California to prosecute all cases of trespass, wherever committed, if he shall deem the evidence in his possession sufficient to warrant the prosecution, which may be, or may have been reported to him, in the same manner that they were heretofore prosecuted; and if the persons thus prosecuted are convicted, and desire to make settlement in accordance with the terms of

the fifth section of said act, that settlement should be made accordingly, and the further proceedings in the case dismissed.

Very respectfully,

C. SCHURZ, *Secretary.*

Hon. CHARLES DEVENS,
Attorney-General.

[16 Op., 189.]

Sections 4 and 5 of the act of June 3, 1878, chapter 151, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," construed in connection with section 2461, Revised Statutes, punishing the cutting or removal of timber growing on the public lands.

DEPARTMENT OF JUSTICE, *October 22, 1878.*

SIR: I have carefully considered paragraph 1 of the "Rules and Regulations for the Protection of Timber," etc., transmitted with your letter of September 24, in connection with Revised Statutes, section 2461, and the two acts of June 3, 1878.

Section 4 of the longer of these two acts merely singles out from the offenses described in section 2461 that of cutting or removing timber "with intent to export or dispose of it," and affixes to it a new and different penalty.

Section 5 simply allows all persons prosecuted for the cutting or removal of timber, "except those who cut or removed with intent to export," to relieve themselves from the penalties prescribed in section 2461 by the payment at the rate of $2.50 an acre of the land on which the trespasses were committed. The effect of this provision is to release offenders from the penalties incurred for offenses committed under the former law prior to the passage of the new act, on their compliance with the specified conditions; those who cut or removed "with intent to export" being expressly excluded from the benefit of the provision.

I see nothing in the language of the provision that limits its operation to prosecutions actually pending when the act was passed.

The effect of the proviso in section 4, as also of the other act of the same date, is simply to exempt certain specified cases from the operation of the provisions of section 2461. It is a necessary implication from these special provisions that the former law continues in force in respect to all cases to which they do not apply.

I am therefore of opinion that paragraph 1 of the rules and regulations transmitted is in accordance with law.

The United States attorney for the district of California has been instructed to be governed in his official action in regard to timber

cases by the views expressed in this letter, a copy of which has been forwarded to him.

Very respectfully,

CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1896.

SIR: I have the honor to acknowledge the receipt, by reference from the Department, "for consideration, report in duplicate, and return of papers," of a letter from the Attorney-General dated May 7, 1896, transmitting copy of a letter from the United States attorney for the western district of Wisconsin, urging the importance of early action on reports submitted to this office presenting evidence in cases of alleged trespasses upon public timber, and adding as follows:

> Again, in all of these cases the General Land Office almost uniformly recommends criminal prosecution. Congress has so legislated that the remedy by criminal prosecution is almost worthless to the Government. The statute supposed to apply is section 2461, under which the penalties are appropriated. Congress, however, in 1878 (1 Supp., 1891, p. 167), passed an act relating to California, Oregon, and other States, by section 4 of which act the cutting of timber in said States is made merely a misdemeanor and the penalty limited to a fine of not less than $100 nor more than $1,000. This act, in 1892, was made general as to all public-land States (27 Stat., 348). The only punishment, therefore, now existing is a fine of not less than $100 nor more than $1,000. A person in prison for nonpayment of this fine could swear out as a poor convict at the end of thirty days. Whether a criminal prosecution is desirable, therefore, is a question to be carefully considered in each particular case.

In regard to the question thus raised as to whether section 2461 U. S. R. S. was repealed by the subsequent act of June 3, 1878 (20 Stat., 89), the operation of which was extended to all the public-land States by the act of August 4, 1892 (27 Stat., 348), I have the honor to report that this question was raised in letter from the Department to the Attorney-General, under date of September 24, 1878, transmitting copy of certain rules and regulations (presumably of August 15, 1878, copy herewith) in connection with section 2461 and the two acts of June 3, 1878 (20 Stat., 88, and 20 Stat., 89).

In said letter it was held as follows:

> I do not understand, however, that either of said acts was intended to repeal section 2461, nor in any manner to affect the prosecutions of persons for depredations already committed, except as therein specified. While it is true section 5 of the act prescribes a rule for settlement, this does not necessarily, nor in fact, take away the right of the Government to prosecute persons who have trespassed upon the public lands. Should you agree with me in these conclusions I have the honor to recommend that you will instruct the United States attorney for the State of California to prosecute all cases of trespass * * * which may be or may have been reported

to him in the same manner that they were heretofore prosecuted; and if the persons thus prosecuted are convicted and desire to make settlement in accordance with the terms of the fifth section of said act that settlement should be made accordingly and the further procedings in the case dismissed.

The Attorney-General, in reply (see 16 Op., 190), states as follows:

Section 4 of the longer of these two acts merely singles out from the offenses described in section 2461 that of cutting or removing timber "with intent to export or dispose of it," and affixes to it a new and different penalty.

Section 5 simply allows all persons prosecuted for the cutting or removal of timber, except those who cut or removed "with intent to export," to relieve themselves from the penalties prescribed in section 2461 by the payment at the rate of $2.50 an acre of the land on which the trespasses were committed. The effect of this proviso is to release offenders from the penalties incurred for offenses committed under the former law prior to the passage of the new act on their compliance with the specified conditions, those who cut or removed "with intent to export" being expressly excluded from the benefit of the provision.

I see nothing in the language of the provision that limits its operation to prosecutions actually pending when the act was passed.

The effect of the proviso in section 4, as also of the other act of the same date, is simply to exempt certain specified cases from the operation of the provisions of section 2461. It is a necessary implication from these special provisions that the former law continues in force in respect to all cases to which they do not apply.

I am, therefore, of opinion that paragraph 1 of the rules and regulations transmitted is in accordance with law.

The United States attorney for the district of California has been instructed to be governed, in his official action in regard to timber cases, by the views expressed in this letter, * * *

In addition to the points covered by the above correspondence between this Department and the Department of Justice, I desire to invite attention to the following facts:

Section 2461 U. S. R. S. is derived from section 1 of the act of March 2, 1831 (4 Stat., 472), and section 4751 U. S. R. S. is derived from section 3 of the same act.

The act of June 3, 1878 (20 Stat., 89), makes the special provision that section 4751 U. S. R. S. is repealed thereby so far as relates to the States and Territory therein named, but makes no such provision in respect to the remainder of the said act of March 2, 1831, from which it appears fair to conclude that only that portion of the act of March 2, 1831, comprehended in section 4751 U. S. R. S. was intended by Congress to be repealed, and that section 2461 remained untouched.

I also respectfully invite attention to the case of Shiver *v.* United States (159 U. S., 491).

The referred papers are herewith returned.

Very respectfully, S. W. Lamoreux,
Commissioner.

The Secretary of the Interior.

Approved by the Secretary of the Interior in letter of May 23, 1896, to the Attorney-General.

THE ACTS OF JUNE 3, 1878 (20 STAT., 88), AND JUNE 3, 1878 (20 STAT., 89), CAN NOT BOTH BE IN FULL FORCE IN THE SAME PLACE.

UNITED STATES *v.* SMITH.

Circuit court, district of Oregon (11 Fed. Rep., 487).

TIMBER ON PUBLIC LANDS IN OREGON.

The act of June 3, 1878 (20 Stat., 88), giving permission to the residents of Colorado, Nevada, the Territories, "and other mineral districts of the United States," to cut timber for certain purposes upon the mineral lands therein, does not apply to Oregon, but the subject of cutting timber on the public lands within such State is regulated by the act of the same date (20 Stat., 89), providing among other things, for the sale of timber lands therein.

MINERAL DISTRICT.

This term, as used in the first of the said acts of June 3, 1878 (20 Stat., 88), has no application to Oregon, there being no such division or district of the State established either by law or common reputation.

CUTTING TIMBER—WHO MAY AND WHAT FOR.

Under the act of June 3, 1878 (20 Stat., 89), persons occupying the public lands in Oregon under the mining, preemption, or homestead laws of the United States may cut and use the timber thereon convenient for the purposes of such occupancy, and may also take other timber from the public lands, if need be, sufficient to maintain the necessary improvements on the lands so occupied; but any cutting or removing timber from the public lands otherwise than this, as with intent to dispose of or wantonly to destroy the same, is a trespass for which the party guilty of the same is liable, civilly and criminally (20 Stat., 90).

DEADY, D. J.:

This action is brought by the United States to recover from the defendant the sum of $10,000 damages for wrongfully cutting and carrying away certain timber between January 1, 1879, and the commencement of the action, August 17, 1881, then being and growing upon that parcel of the unsurveyed public lands of the plaintiff, situated in Baker County, Oreg., which, if surveyed, would be township 11 south, of range 40 east, of the Willamette meridian, with intent to dispose of the same, and for that he "did convert and dispose of the same."

The defendant, for answer to the complaint, denies the allegations thereof, and for a further answer says that at the time of committing the alleged unlawful acts the defendant was a citizen of the United States, over 21 years of age, and a bona fide resident of "a mineral district of the United States," consisting of Baker, Grant, Union, Umatilla, and Wasco counties, the same being "the fourth mineral district of the United States in the State of Oregon," and that while he was such a resident he did enter upon the unsurveyed tract of public land aforesaid, the same being within said mineral district, and "cut and remove therefrom a small number of trees growing thereon;" that said tract of land was mineral land, and not subject to entry under any law of the United States, "except for mineral entry;" that

said trees were "cut and removed and actually used for building, agricultural, mining, and domestic purposes by defendant and others within said mineral district;" and that the cutting and removing of said trees constitute the trespass mentioned in the complaint. The plaintiff demurs generally to this defence.

The first act of Congress which in terms authorized or permitted the cutting of timber upon the public lands by a private person for any purpose was passed June 3, 1878 (20 Stat., 88), and is entitled "An act to authorize the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes." This act contains three sections. The first one authorizes any bona fide resident of the States aforesaid or either of the Territories—naming them—"and all other mineral districts of the United States," to fell and remove, for building, agricultural, mining, or other domestic purposes," any trees growing upon the public lands, "said lands being mineral," and not then subject to entry, "except for mineral entry;" subject to such regulations as the Secretary of the Interior may prescribe for the protection of the timber upon said lands, and other purposes, with a proviso that the act should not "extend to railroad corporations." The second section makes it the duty of the officers of any local land office "in whose district any mineral land may be situated" to ascertain whether timber is cut or used upon such mineral lands, "except for the purposes authorized by the act," and to give notice thereof to the Commissioner of the General Land Office. The third section prescribes the punishment for a violation of the act, or the rules made in pursuance thereof.

The act is very loosely and unskillfully drawn and abounds in unnecessary and indefinite phrases and clauses of the "and so forth" character. The privilege conceded by it is limited to citizens of the United States, "and *other* persons" resident in certain States and Territories—naming them—"and all *other* mineral districts of the United States." It allows timber "or *other* trees" to be cut for building, agricultural, mining, "or *other* domestic" purposes, subject to such regulations as the Secretary of the Interior may prescribe for the protection of the timber and undergrowth, "and for *other* purposes."

On the same day another act was passed (20 Stat., 89), entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory." This act contains six sections. The first, second, and third ones provide for the sale of the "surveyed public lands" within these States and this Territory not included in any reservations of the United States, valuable chiefly for timber or unfit for cultivation, which have not been offered for sale, in quantities not exceeding 160 acres to one person or association, at the minimum price of $2.50 per acre; with a proviso that the act should not, among other things, authorize the sale of a "mining claim" or "lands containing gold, silver, cinnabar, copper, or coal."

Section 4 provides "that after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy *any timber growing on any lands of the United States*" in the States or Territory aforesaid, "or remove or cause to be removed any timber from such public lands with intent to export or dispose of the same;" * * * and that any person so offending shall, on conviction, be fined for every such offense not less than $100 nor more than $1,000, with a proviso that the act shall not "prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements." Section 5 provides for the relief of persons prosecuted in said States and Territory for the violation of the timber act of March 2, 1831 (4 Stat., 472; sec. 2461, Rev. Stat.), and repeals section 4751 of the Revised Statutes, providing for the disposition of penalties and forfeitures incurred under said act or section, and directs that all moneys collected under that act shall be covered into the Treasury of the United States. Section 6 provides that all acts and parts of acts inconsistent with such act are repealed.

In support of this plea or defense counsel for the defendant contends: (1) That the first-named act applies to Oregon, as well as the States and Territories therein expressly named, because it is included in the phrase "all other mineral districts of the United States;" and (2) that the permission contained in the first section of such act to fell and remove timber is not limited to the land occupied by the party cutting or removing it, nor to the quantity needed for his individual use, but that it is a license to every resident of a "mineral district," so called, in the United States to fell and remove all the timber he may from any portion of the public lands in such district, whether mineral, agricultural, or timber, to be used by anyone within the district for building, agricultural, mining, or other domestic purposes; and further, that the second act, although made applicable to Oregon by name, in no way affects or limits the operation of the first one therein. If this is the law, then all the timber on the public lands in Oregon may be cut and removed therefrom with impunity, provided it is not done for the purpose of being exported from the State or mineral district where cut. No adequate reason is given or suggested why Congress should thus suddenly depart so far from the traditional policy of the Government to preserve the timber on the public lands for the use of those to whom it might ultimately dispose of them.

The argument hinges upon the meaning and application of the phrase "mineral district." The use of it in the United States statutes is new, and confined to this act. As a matter of fact, so far as appears there is no section of this State known and defined as the mineral district. Being neither known in law or fact as the designation of any well-defined or exact locality, it is as void of meaning and incapable of application as the phrase "tree district," "stone district," "alkali dis-

trict," or "water district." The title of the act does not contain the phrase, but limits its operation to the citizens of Colorado, Nevada, and the Territories; and it is not probable that there was any thought in the mind of Congress of extending it any further.

The phrase "mining district" is well known, and means a section of country usually designated by name or understood as being confined within certain natural boundaries, in which gold or silver, or both, are found in paying quantities, and which is worked therefor, under rules and regulations prescribed by the miners therein, as the White Pine, the Humboldt, etc.

This term, and the thing signified by it, are also recognized by the United States statutes. (Secs. 2319, 2324, Rev. Stat.; Copp, U. S. Min. Lands, 471).

There is no method of proceeding known to the law by which a district of country can be prospected, surveyed, and established, or declared to be a "mineral district." The ordinary surveys of the public lands do not include any examination or exploration of them for mineral deposits, the surveyor being only required "to note in his field book the true status of all *mines*, salt licks, salt springs, and mill seats which come to his knowledge." (Sub. 7, sec. 2395, Rev. Stat.) By section 12 of the act of May 10, 1872, entitled "An act to promote the development of the mining resources of the United States" (17 Stat., 95; sec. 2334, Rev. Stat.), it is provided that the surveyor-general "may appoint in each *land* district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims." This "land district" is a division of the State or Territory, as the case may be, created by law, in which is located a land office for the disposition of the public lands therein. There are four of them in this State. It is probable that these "land districts," in the mining States like Colorado and Nevada, were sometimes familiarly spoken of as "the mineral districts," from whence the phrase found its way into the act of June 3, 1878. But although there are "some mineral lands" and "mining districts" in Oregon, it is not known that there are any considerable or contiguous sections of the country to which the term "mineral district" could properly be applied, and it is certain that there is none to which it is applied by law. It may be admitted that the use of the general words "all other mineral districts of the United States," immediately following the enumeration of the particular States and Territories mentioned, is some evidence of an intention by Congress to extend the operation of the act beyond the limits of said States and Territories. But the difficulty is that the language used has no definite signification or local application, and therefore must fail to have any effect for want of certainty. Besides, this act is one in favor of individuals and in derogation of the rights of the public—the whole people of the United States—to whom these lands and timber belong, and

therefore is not to be enlarged by construction so as to include things or persons not expressly enumerated, mentioned, or described therein with reasonable certainty. (Smith, Com., sec. 738 et seq.) For these reasons the act, in my judgment, is not applicable to Oregon, but is confined to the States and Territories therein expressly mentioned.

By act No. 2 of the said acts of date of June 3, 1878, it is declared unlawful to cut *any* timber on *any* of the public lands in Oregon with the exception of that cut by a "miner or agriculturist" in the ordinary working or clearing of his mining claim or farm or that taken therefrom to support his improvements on such claim or farm. This provision is inconsistent with and repugnant to the license to cut timber contained in act No. 1. Either the prohibition contained in act No. 2 must be limited and restrained by construction so as not to apply to mineral land—land subjected to "mineral entry"—or act No. 1 must be held not applicable to Oregon. Both can not be in full force in the same place. It may be said that No. 2, being subsequent in point of place in the statute, is presumed to have been passed subsequently to the other, and therefore repeals or modifies it so far as they are in conflict. But both acts being passed on the same day and measurably upon the same subject, I think they may best be considered as part of one act, and each be allowed to stand and have effect as far as it can without conflict with the other. It can not be said that in passing act No. 1 Congress expressly included Oregon in the license therein given to cut timber on the public lands, and it is only claimed that it contains some general words which may be interpreted so as to include it, while upon the very face of the act it is plain that in the passage of No. 2 it was the intention of Congress to regulate the subject of the sale and use of the timber upon any of the public lands in Oregon. This being so, the only reasonable conclusion is that act No. 2 excludes No. 1, even if there was any ground for holding the latter applicable to this State under any circumstances. The subject is fully regulated by the former act, and there is nothing left for the latter one to operate upon without displacing some provision of the other. The provisions for the sale of timber lands, for the prevention of cutting timber on the public lands, and for allowing the miner and farmer to cut and use the timber on their claim and to take it from the public lands for the improvement of such claims cover the whole ground, and if allowed to be in full force here must exclude the Colorado act from the State.

The plea is insufficient. A defense to an action for unlawfully cutting timber on the public lands in this State must show that it was cut upon the mining or farming claim or land of the defendant in the ordinary course of working the same or preparing it for tillage, as the case may be, or was taken from the public lands for the necessary improvements thereon. It does not appear from the plea herein that the defendant cut the timber in question from land then occupied by him

for the purpose of mining or agriculture, or that it was cut from the public lands for maintaining the necessary improvements thereon.

From all that appears the defendant was unlawfully engaged in cutting timber from the public lands, and is at least liable to the plaintiff in damages equal to the value thereof.

The demurrer is sustained.

UNITED STATES *v.* BENJAMIN.

Circuit court, district of California (21 Fed. Rep., 285).

PUBLIC LANDS—CUTTING TIMBER ON MINERAL LANDS IN CALIFORNIA—ACT OF JUNE 3, 1878, CHAPTERS 150, 151.

Timber upon mineral lands in the State of California is protected and governed by the provisions of the act of June 3, 1878, chapter 151 (20 Stat., 89), made specifically applicable to that State, and not by the general provisions of chapter 150 of the act of June 3, 1878 (20 Stat., 88), which can only operate upon "mineral districts," if any there be, not specifically provided for by designating the particular State or Territory in which it is situated by name.

SAWYER, J.:

The United States bring this action to recover the value of lumber alleged to have been manufactured from timber trees unlawfully cut on the public lands. The defendant, as a justification, specially answers that the trees from which the lumber in question was manufactured grew and were cut "in a mineral district of the United States," known as such throughout the State, and so recognized by the customs of miners and the decisions of the courts, and designated "The Georgetown mineral and mining district," being "in the mineral belt of said State of California and county of Eldorado;" that defendant was and is a citizen of the United States and a bona fide resident of said "Georgetown mineral district;" that the land on which said trees grew was public land of the United States, mineral in character, and not subject to entry under existing laws of the United States except as mineral lands; that the lumber "was used in said mineral district and adjoining mineral districts of said county of Eldorado for building, agricultural, mining, and other domestic purposes, but principally for mining purposes; that said timber was felled, removed, and used for the said purposes, * * * in accordance with the rules and regulations prescribed by the Secretary of the Interior;" and that said timber "was felled and removed, and said act committed, under a license from the United States, under and by virtue of an act approved June 3, 1878, entitled 'An act authorizing the citizens of Colorado, Nevada, and other Territories to fell and remove timber on the public domain for mining and domestic purposes.'"

The act under which defendant attempts to justify provides—

That all citizens of the United States, and other persons bona fide residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona,

Utah, Wyoming, Dakota, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes.

The United States attorney insists that this act is not applicable to the State of California, and, consequently, it can afford no justification of the acts complained of. The defendant, on the other hand, contends that the words "*all* other *mineral* districts of the United States" embrace every "*mining* district" recognized as such by the customs of miners of the locality embracing it, in whatever State or Territory it may be situated. A similar question arose in the circuit court for the district of Oregon in U. S. *v.* Smith, in which Deady, J., after a full and careful consideration of the question, held that the act did not apply to the State of Oregon. (U. S. *v.* Smith, 8 Sawy., 101, S. C.; 11 Fed. Rep., 487.) If it does not apply to Oregon, for similar reasons it is inapplicable to California.

After a careful consideration of the question I am constrained to concur in the conclusion reached by the district judge of Oregon, and hold the provison to be inapplicable to California.

If this act stood alone, the position taken by the defendant's counsel would not be without plausibility. But, unfortunately for him, it does not stand alone. On the same day another act was passed, specifically applicable to timber lands in the States of California, Oregon, Nevada, and Washington Territory, which contains provisions wholly inconsistent with the provisions relied on in the act relating specifically to Colorado and the Territories therein named. It does not appear which act was, in fact, first passed, but probably it was the first-mentioned act relating to Colorado, etc., as that is designated in the statutes as chapter 150, while the act relating to California, etc., is numbered chapter 151 of the statutes. (See 20 Stat., 88, 89.) If the latter act is to be treated as a subsequent statute, it repeals the inconsistent provisions of the prior act, as it expressly provides that "all acts and parts of acts inconsistent with the provisions of this act are hereby repealed" (sec. 6). But the most favorable view for the defendant is to regard the two statutes, as they were both passed on the same day, as constituting but one statute, the former part of the act making specific provisions for Colorado and the other States and Territories named, and the subsequent provisions of the act making like provisions for California and the other States and Territories therein named. So viewing the statute, we must, if possible, construe all the provisions in such manner that every part can stand and have effect.

In such cases, also, loose general provisions of doubtful import in the former part of the statute must yield to subsequent clear and specific provisions which are so explicit as to admit of but one construction. The clause "all other mineral districts of the United States," in the first-named act, as shown by Deady, J., in the case already cited, is very general and exceedingly indefinite and uncertain as to its application, while the provisions of the other act are made *specifically* applicable to the State of California by terms so clear and explicit as not to be open to any other construction. The most that can be said of the general clause is that it can only refer to "all other mineral districts of the United States" not otherwise specifically pointed out by other provisions of the act, the two acts being regarded as one. But California is otherwise specifically provided for. In my judgment the timber upon the public lands in the State of California is protected and governed by the provisions of the second act, made specifically applicable to California, and not by the loose *general* provisions of the first act, which can only operate upon "mineral districts," if any there be, not specifically provided for, by designating the particular State or Territory in which it is situated by name.

To hold otherwise would be to make the specific and certain yield to the general, indefinite, and uncertain, which would be contrary to the well-established canons of statutory construction. The second act expressly provides "that after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, *any timber* growing on *any lands* of the United States in *said States* and Territories," of which California is the first specifically named in the act: "*Provided*, That nothing herein contained shall prevent any *miner* or *agriculturist* from clearing *his* land *in the ordinary working* of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements." Thus it will be seen that the right to cut timber is much more restricted as applied to the States and Territories named in this act than the right conferred on the residents of the States and Territories named in the other act. In this act the right is limited strictly to the *miner* and *agriculturist*, and is restricted to cutting timber on his *own mining claim* or *farm*, and to the purpose of clearing the land in the "ordinary working of his mining claim," or "preparing his farm for tillage," and to "taking the timber necessary to support *his* improvements." The part of the answer in question does not show defendant to be either a miner or farmer, or that he cut the timber on his own mining or farming claim, or that he did it for any of the designated purposes. Indeed he does not attempt to bring himself within the provisions of this act relating specifically to California, but he relies wholly on the other act, which specifically relates to Colorado, and the other Territories and districts therein named, in general indefinite terms, which latter act is much more liberal in its provisions than the other.

It follows that the facts alleged are insufficient to constitute a defense, and, if true, are wholly immaterial.

The demurrer must be sustained, and the motion to strike out granted; and it is so ordered.

TIMBER ON HOMESTEAD ENTRIES.

United States *v.* Levi W. Nelson.

District court, district of Oregon (5 Sawyer, 68).

Timber on Public Lands.

The enactment of the preemption, homestead, and mining laws by Congress has modified the operation of the act of March 2, 1831 (sec. 2461, Rev. Stat.), prohibiting absolutely the cutting or removal of timber on the public lands, so that persons occupying portions of such lands under such laws may, before becoming the owners thereof, cut and use the timber thereon so far as the same may be necessary to accomplish the purpose for which the land is occupied.

See U. S. *v.* O. A. Dodge, cited on page 180.

The Timber Cases.

District court, western district of Missouri (11 Fed. Rep., 81).

Public Lands—Rights of Settlers.

Where a person enters upon public land with a view of preempting it, and before the expiration of the year during which he ought to have proven up his claim he homesteaded his preemption, the preemption as well as the homestead must have been taken in good faith for the purpose of residence, settlement, and improvement.

Same—Right to Cut Timber.

A person entering on the public land for the purpose of preemption, or to secure a homestead, in good faith, may cut the timber standing thereon for the purposes of cultivation, and after applying such portion as can be used for the improvement he may sell or dispose of the balance.

Same—Restriction as to Right.

A settler on the public lands has no authority to go outside of the improvements, cut or sell timber, and thus denude the lands and destroy the value of the public domain, even though he intends to acquire the title under his claim.

See "Use of public timber by virtue of right of occupancy," case of United States *v.* Cook (19 Wall., 591), on page 62.

See also decision in case of Isadore Cohn (20 L. D., 238), cited on page 39.

United States *v.* Yoder.

District court, district of Minnesota (18 Fed. Rep., 372).

Action of Trover—Right of Settlers to Cut Timber and Improve Land Before Preemption.

A settler claiming in good faith a homestead can, for the purpose of improving the land, cut down the necessary timber before he files his entry in the land office. There is nothing in the homestead act requiring an entry in the land office before settlement.

United States *v.* Lane.

Circuit court, eastern district of Wisconsin (19 Fed. Rep., 910).

Public Land—Entry—Right to Cut Timber.

One who has entered upon public land according to law for the purpose of claiming a homestead therein, and is residing thereon in good faith and improving it for agricultural purposes, is entitled to cut so much timber from the land as is necessary for his actual improvements; but until he has received his patent he can not cut timber for any other purposes nor under any other conditions.

United States *v.* Perkins et al.

Circuit court, western district of Louisiana (44 Fed. Rep., 670).

Public Lands—Cutting Timber—Subsequent Purchase.

Where a homesteader, who has never had possession of the land included in his homestead claim, and whose entry has been canceled, buys the land from the Government, such purchase does not pass title to timber which he had cut from the land before his purchase and after he had learned that his homestead entry was invalid.

Same—Measure of Damages.

In an action by the United States for the value of timber bought by defendant from a trespasser who had knowingly cut it from the public land, the measure of damages is the value of the timber at the time of the purchase.

Stone *v.* United States.

Circuit Court of appeals, ninth circuit (64 Fed. Rep., 667).

* * * * * * *

Public Lands—Settlers—Cutting and Selling Timber—Liability of Purchasers.

Where settlers on public lands file declarations under the preemption or homestead laws, with intent to defraud the Government by removing and selling the timber thereon, and then leaving them, a purchaser of such timber is liable to the Government for its value.

Same—Action for Value of Timber Purchased—Burden of Proof.

In an action by the United States to recover the value of timber cut from public lands, where defendant claims that he purchased the timber from settlers on such lands under the preemption and homestead laws, the burden is on him to show the good faith of such settlers, and their right to cut and sell such timber.

United States *v.* Murphy.

Circuit court, western district of Michigan, northern division (32 Fed. Rep., 376).

Public Lands—Cutting Timber—Homesteader's Rights.

While holding land under a homestead entry the homesteader can only cut and sell the timber from such portion or parts of the land as are being cleared for cultivation or settlement.

Same—Cutting Timber—Mistaken View of Rights.

The fact that defendant was induced, through the wrong representations of the register of the land office, to believe in the unrestricted right of the homesteader to cut timber from his entry, does not estop the Government from prosecuting him for such unlawful cutting.

SAME—CUTTING TIMBER—CRIMINAL INTENT.

It is no defense to a prosecution for unlawful cutting of timber from public land that there was no criminal intent in the cutting.

SAME—ACTS RELATING TO—CONSTRUCTION OF, BY SECRETARY OF INTERIOR.

The interpretation placed upon public-land acts by the Secretary of the Interior is not binding upon the courts.

CUNNINGHAM ET AL. *v.* METROPOLITAN LUMBER CO.

Circuit court of appeals, sixth circuit (110 Fed. Rep., 332).

* * * * * * *

A homestead settler, who has not perfected his right so as to entitle him to a patent, has no right or authority to cut and remove timber from the land, and can give no title to such timber as against the United States.

In the case of a homesteader purporting to convey by bill of sale right to the timber on his claim subsequent to abandonment of the land, parties taking the timber under such "bill of sale" held to be trespassers and liable to the United States for the full value of the timber, wherever and in whatever condition found. (See Land Office Report for 1889, p. 291, case of U. S. *v.* John C. Kirby et al.)

UNITED STATES *v.* NIEMEYER ET AL.

District court, eastern district of Arkansas (94 Fed. Rep., 147).

1. PUBLIC LANDS—CUTTING OF TIMBER—RIGHTS OF HOMESTEADER.

A homesteader, before he has become entitled to a patent to the land, is not authorized to sell timber therefrom for the purpose of obtaining money with which to hire improvements made which the law contemplates he shall make himself. He has no right to sell timber for any purpose from any part of the land except such as he intends in good faith to put into immediate cultivation; and a use of the land for grazing purposes, without plowing it up, is not cultivation as meant by the law.

2. SAME—CRIMINAL LIABILITY FOR CUTTING TIMBER—INTENT.

If a person cuts and removes timber from lands which he knows to belong to the United States, and to be occupied under a homestead claim, under a purchase or license from the homesteader, and knowing also that the land from which it is taken is not to be put into immediate cultivation, he is presumed to have intended to take the timber unlawfully, and is subject to prosecution therefor.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 2, 1898.

SIR: I have the honor to acknowledge the receipt of your letter of June 28, 1898, in which you quote from a letter of Hon. Jacob Trieber, United States attorney for the eastern district of Arkansas, dated June 18, 1898, to this office, as follows:

The court held that a homesteader could convey no valid title to timber cut from his entry before a patent was issued, except such timber as was cut from the land he was clearing for actual cultivation.

In regard to said ruling you state that your impression has been "that when a homesteader has *earned* his patent, by complying in good faith with all the requirements of the law, making his final proof and being given his final receipt, the only act remaining to complete the transaction being the mere formal issue of the patent by your (this) office, the homesteader could convey a valid title not only to the timber on the land, but to the land itself, if he should choose to sell it," and you ask for the holding of this office on that point.

In reply you are advised that the ruling of the court above specified appears to be strictly in accordance with the decision of the Supreme Court of the United States in the case of Shiver *v.* United States (159 U. S., 491), in which it is held, in brief, that public land duly and properly entered for a homestead under the homestead laws of the United States continues to be property of the United States pending proceedings before and a final disposition of said entry by this Department, "and until a patent is issued."

All action taken by this office involving the question of title to lands embraced in homestead entries is based upon said decision. The general impression, referred to in your letter, that, after making final proof and receiving final receipt and certificate on a homestead entry, the claimant can legally sell or dispose of the timber thereon, or even the land itself, is based upon the presumption that the entryman has, up to that time, in good faith, fully complied with all of the requirements of law as to residence, cultivation, and improvements; that his proof is not false or fraudulent, and that his entry is legal and without defects.

The issuance of a final receipt and certificate on an entry only invests the entryman with an equitable title to the land, which, upon proper showing of defect, fraud, or illegality, can be attacked by this office at any time within two years from date of the issuance of said receiver's final receipt, when, in the absence of any pending contest or protest against the validity of an entry, the title thereto is confirmed in the entryman by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095).

A homestead claimant, therefore, does not secure an absolute and clear title to the land or the timber thereon (which is a part of the realty) until patent is actually issued thereon by the Government, and, in the absence of patent, the title is not confirmed in him until a period of two years has elapsed, without protest or contest, since the issuance of the receiver's final receipt.

* * * * * * *

Very respectfully,

BINGER HERMANN,
Commissioner.

Hon. JAS. K. JONES,
United States Senate.

THE UNITED STATES *v.* HENRY HAZLETT.

Circuit court, district of Idaho.

BEATTY, J.:

This action is for the replevin of a lot of cedar posts, and is submitted to the court for hearing upon an agreed statement of facts from which it appears that such posts were cut by defendant from a tract of 10 acres of the public lands of the United States; that said 10 acres were a part of a tract of 160 acres upon which one Brennan had resided for two years with the intention of entering it as a homestead when surveyed; that defendant had a contract with the Union Pacific Railway Company to deliver it posts at Pocatello to fence its railroad track which had been completed and in operation for over eight years prior; that such place of delivery was 700 miles from the place of cutting such posts; that said Brennan intended to clear said 10 acres for agricultural purposes, and that the defendant, for the purpose of fulfilling his said contract with the railway company, entered into a contract with said Brennan for the timber on said 10 acres and thereafter cut and removed the same from the land and had possession thereof when it was seized by plaintiff.

The first question is, whether the contract between the defendant and the homesteader for the timber is a valid one as against the plaintiff. The rule is well settled by numerous decisions that in actions by the United States, and especially in civil actions, for the cutting of timber on the public lands, it devolves upon the Government only to show the character of the lands and the cutting of the timber thereon, whereupon the onus probandi rests with the defendant to show such cutting was lawful.

It is also well settled that the homesteader can not cut or remove timber from his homestead for the sole purpose of selling it, but he can from time to time cut only such as is actually necessary for his use upon the premises in making the necessary improvements thereon and in clearing the land in good faith for agriculture or some other useful purpose; that if after so cutting timber in the actual process of clearing the land and making use thereof in his necessary improvements there is a surplus he may sell it.

In an action brought against a homesteader for an unlawful cutting or disposition of timber it devolves upon him to produce the facts showing his good faith. He should show the improvements he has made upon the land, the buildings and fences erected, the land cleared and how far cleared, the character of his residence upon the land, and any other facts going to show that his occupation of and acts concerning the land were those of an actual homesteader.

It is also the law that if the homesteader attempts to dispose of timber from his claim contrary to law the person contracting with or purchasing of him gets no title. If, therefore, the facts in this case do

not show that the homesteader had a right to sell the timber under the circumstances he did, it follows that the defendant procured no title thereto.

What now are the facts and to what conclusion do they lead? It appears that defendant, to carry out his contract with the railway company, contracted with the homesteader for the timber upon 10 acres of the homestead tract, and proceeded to cut and remove it. It does not appear that the land was cleared or that any improvements of any kind were made upon the land or that the land was in any way benefited by the acts of either party; and so far as the facts go it only appears that the defendant cut and removed this timber to be disposed of to the railway company. It is alleged that the homesteader had resided on the land for two years and intended to clear and enter it; but something more than mere intentions must appear, and if he had resided there the motive of his residence and occupation must be shown. The facts as stated, instead of leading to the conclusion that the land was actually occupied as a homestead and the timber was removed therefrom in good faith in the process of clearing and improving the land, rather point to the conclusion that defendant's contracts were made to avoid the law and cut the timber simply for the purpose of fulfilling his railway contract, and that Brennan's sole object was to receive money for the timber and not to clear the land or improve it. If such contracts and such facts will justify the cutting and removal of timber from the Government lands, then there is nothing in the law to prevent the destruction of all timber on all lands subject to occupation and entry. I can not so construe the law and must conclude the defendant did not by the acts stated procure title to the posts involved in this action.

I do not mean to be understood as holding that a homesteader may not employ others to clear or improve his land; but when he does, it must appear that such employment is made in good faith to have the land actually cleared and not to leave the contract open to a well-grounded suspicion that it is to avoid the law and to dispose of the timber for profit instead of improving the land.

The question was raised whether the law gives the railway company the right to procure from the public domain timber supplies for its use and, if it does, whether it does not follow that defendant's contract with Brennan, being for the purpose of furnishing such supplies, is lawful. The first Congressional act granting railroads rights to timber and other material from the public lands is that of 1875 (1 Supp. Rev. Stat., 1890), by which it is provided that they may take "from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad."

The evident construction of this act, as has been held, is that it applies only to those lands lying along the line of the road, and does

not include those situated a long distance from it; also that the right continues only during the time of the original construction of the road, and not to subsequent repairs, changes, or improvements. (Denver R. R. *v.* United States, 34 Fed. Rep., 838.)

It does not appear by the facts whether these posts were for the first building or the repair of fences, but this is probably immaterial, for it is doubtful whether the act was intended to include the building of fences as a part of the construction of the road, and especially fences constructed over eight years after the completion and operation of the road. Moreover, the timber was not cut from lands adjacent to the line of the road, but on those far distant from it. The subsequent acts modifying or granting additional timber rights expressly exclude railroads from their benefits. (1 Supp. Rev. Stat., 166, 939.) It must follow that the railway company had no such right to the timber on the public lands for the purpose named in this case as will justify or sustain the contract of defendant with Brennan. Certainly the railway company has the right to purchase any timber of anyone having the right to sell.

The defendant having no title to the posts in controversy, judgment for such posts or their value of $125 and costs of action against him is now ordered.

CUTTING TIMBER ON SHARES.

UNITED STATES *v.* JAMES AUTREY.

District court, southern district of Alabama, May term, 1894.

The charge to the jury reads as follows:

"The court instructs you that the defendant had the right to cut, or to cause to be cut, timber on his homestead land suitable and sufficient to build necessary and convenient houses and fences for his home, and to have that timber sawed into suitable lumber to make such improvements on his homestead, and the court further instructs you that the defendant could have done what is practically the same thing, and that is, could have exchanged timber for lumber to make such improvements; that is to say, could have exchanged timber for lumber of equal value, but only so much timber as was necessary to make the lumber for such improvements; so much as was necessary for such improvements, excluding the cost of cutting, sawing, and hauling such timber, etc., to and from the mill; and if he only did this, and did it in good faith, he should be acquitted.

"Or, if he made such exchange for lumber with a part of the timber and did so in good faith to make necessary improvements, then, as to such part he should be held guiltless, and guilty only as to the excess of timber (pine trees) over and above what was necessary to make the lumber for his improvements.

"Let me illustrate what I mean to make the proposition clearer to you. If the defendant wanted 9,000 or 10,000 feet of lumber to make his improvements, he had the right to cut or cause to be cut as many trees as were necessary for that purpose, whether it be 30, 40, or 50—whatever number of trees you find from the evidence was necessary for that purpose—but he could not lawfully cut more than that; any cutting in excess of that number of trees would be an unlawful cutting.

"He had not a right to cut trees on his homestead for the purpose of sale or profit, or to pay debts or loans of money, or to pay his expenses, or to buy supplies—in short, no right to cut them for sale for any purpose—and he had no right to cut them and pay any such debts or expenses with them, or to cut them for any such purposes."

* * * * * * *

Shiver *v.* United States.

Certificate from the circuit court of appeals for the fifth circuit (159 U. S., 491).

Land duly and properly entered for a homestead under the homestead laws of the United States is not, from the time of entry, and pending proceedings before the Land Department, and until final disposition by that Department, so appropriated for special purpose, and so segregated from the public domain as to be no longer lands of the United States within the purview and meaning of section 2461 of the Revised Statutes of the United States; but, on the contrary, it continues to be the property of the United States for five years following the entry, and until a patent is issued.

Where a citizen of the United States has made an entry upon the public lands of the United States under and in accordance with the homestead laws of the United States, which entry is in all respects regular, he may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and perhaps may exchange such timber for lumber to be devoted to the same purposes; but he can not sell the timber for money, except so far as it may have been cut for the purpose of cultivation; and in case he exceeds his rights in this respect, he may be held liable in a criminal prosecution under section 2461 or section 5388 of the Revised Statutes of the United States, or either of said sections, for cutting and removing, after such homestead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead.

In holding that, as between the United States and a homestead settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, the court is not to be understood as expressing an opinion whether, as between the settler and the State, it may not be deemed to be the property of the settler, and therefore subject to taxation.

Shiver was tried upon an information filed in the district court for the southern district of Alabama for cutting and removing 200 pine trees from a quarter section of land in Monroe County, which he had entered as a homestead on January 26, 1894. It appeared that the cutting began about the 1st of April, and that all the standing timber, amounting to about 500 trees, had been, either before or after complaint was made against him, cut and removed from the land; that the defend-

ant and his family were living on the land, and had erected a box house worth about $100; that the lumber was cut and hauled from the land by defendant's procurement; that it had been cut all over the land; that the land cleared amounted to about an acre; that the house was not yet completed; that the timber was taken to the mill of the Bear Creek Mill Company, of which defendant was an employee; that defendant was not living on the land when the cutting began, and that the trees would make upward of 150,000 feet of lumber; that they were not cut for the purpose of clearing the land for cultivation, and that such timber was cut within four months after defendant had made his homestead entry; that the trees yielded an aggregate of the sum of $126, while the improvements made upon the land cost $229. The lumber put into the building amounted to 9,765 feet.

There was conflicting evidence as to the motives of the defendant in cutting and selling the timber. He claimed that the logs were exchanged for lumber and building material, all of which were put into his improvement; the Government claiming that it was cut for the purpose of sale and profit.

The court instructed the jury that defendant had the right to cut timber on his homestead suitable and sufficient to build necessary and convenient houses, fences, etc., for a home, and to have that timber sawed into suitable lumber to make such improvements on his homestead; that he could have exchanged timber for lumber to make such improvements, but only so much as was necessary, and that if he only did this, and did it in good faith, he should be acquitted. On the contrary, that any cutting in excess of the number necessary to make his improvements would be unlawful. That he had no right to cut trees for the purpose of sale for profit, or to pay debts or loans of money, or to pay his expenses, or to buy supplies; in short, he had no right to cut them for sale for any such purpose.

Defendant was convicted, and appealed to the circuit court of appeals, which certified to this court the following questions:

1. Whether lands duly and properly entered for a homestead, under the homestead laws of the United States, are from the time of entry and pending proceedings before the Land Department and until final disposition by that Department, so appropriated for special purpose, and so segregated from the public domain as to be no longer lands of the United States within the purview and meaning of section 2461 of Revised Statutes of the United States?

2. Where a citizen of the United States has made an entry upon the public lands of the United States under and in accordance with the homestead laws of the United States, which entry is in all respects regular, can such citizen be held liable in a criminal prosecution under section 2461 or section 5388 of the Revised Statutes of the United States, or either of said sections, for cutting and removing, after such home-

stead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead?

Mr. Justice Brown delivered the opinion of the court:

This case turns upon the question as to what are "lands of the United States" within the meaning of Revised Statutes, section 2461, providing for the punishment of persons guilty of cutting timber upon such lands other than for the use of the Navy. Obviously the question is not whether such lands are so far withdrawn from sale as to be no longer subject to appropriation by any railroad or other person or corporation to which a land grant has been made, but whether they are still so far the property of the United States that the Government may protect itself against an unlawful use of them. Indeed, this court has settled by repeated decisions that the claim of a homestead or preemption entry made at any time before filing a map of definite location of a railway prevents the lands covered by such claim from passing to such railway under its land grant, even though such entry be subsequently abandoned. (Kansas Pacific Railway Co. *v.* Dunmeyer, 113 U. S., 629; Hastings, &c. Ry. Co. *v.* Whitney, 132 U. S., 357; Whitney *v.* Taylor, 158 U. S., 85; Sioux City Land Co. *v.* Griffey, 143 U. S., 32.) The same principle applies where lands have been reserved for any purpose whatever. (Wilcox *v.* Jackson, 13 Pet., 498; Witherspoon *v.* Duncan, 4 Wall., 210; Newhall *v.* Sanger, 92 U. S., 761; Kansas Pacific Railway *v.* Atchison Railway, 112 U. S., 414.)

While these cases indicate that lands once appropriated to a certain purpose thereby cease to be available for another purpose, there is nothing in them to show that the United States loses its title to such lands by the first appropriation, or that they cease to be the property of the Government. Upon the contrary, it was said by this court, as early as 1839, in Wilcox *v.* Jackson (13 Pet., 498, 516), that "with the exception of a few cases, nothing but the patent passes a perfect and consummate title." So in Frisbie *v.* Whitney (9 Wall., 187, 193): "There is nothing in the essential nature of these acts" (entering upon lands for the purpose of preemption) "to confer a vested right, or indeed any kind of claim to land, and it is necessary to resort to the preemption law to make out any shadow of such right." In this case the following extract from an opinion of Attorney-General Bates was quoted with approval:

> A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of preemption, but this is only a privilege conferred on the settler to purchase lands in preference to others. * * * His settlement protects him from intrusion or purchase by others, but confers no right against the Government.

A number of authorities were cited to the same effect. It was held that it was within the power of Congress to withdraw lands which had been preempted from entry or sale, though this might defeat the imperfect right of the settler. In the Yosemite Valley case (15 Wall.,

77) the construction given to the preemption law in Frisbie *v.* Whitney was approved, the court observing (p. 88):

> It is the only construction which preserves a wise control in the Government over the public lands, and prevents a general spoliation of them under the pretense of intended preemption and settlement. The settler, being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the Government, a convenient protection for any trespass and waste in the destruction of timber or removal of ores which he might think proper to commit during his occupation of the premises.

The right which is given to a person or corporation by a reservation of public lands in his favor is intended to protect him against the actions of third parties, as to whom his right to the same may be absolute; but as to the Government his right is only conditional and inchoate. By the homestead act, Revised Statutes, section 2289, certain classes of persons therein specified are entitled to enter a quarter section of land, subject to preemption at a certain price, upon making an affidavit of facts (sec. 2290) before the register or receiver, including in such affidavit a statement that "his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person." By a later act, adopted in 1891 (26 Stat., 1095), this affidavit is now required to state that the settler "will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as the agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon." By section 2291, no patent shall issue until the expiration of five years from the date of the entry, the settler being required to prove by two credible witnesses that he has resided upon or cultivated the land for such term of five years immediately succeeding the time of filing the affidavit, and that no part of such land has been alienated, except for certain public purposes. By section 2297, if, before the expiration of the five years, the settler changes his residence or abandons the land for more than six months at any time, the lands so entered shall revert to the Government; and by section 2301, the settler may, at any time before the expiration of the five years, obtain a patent for the lands, by paying the minimum price therefor and making proof of settlement and cultivation, as provided by law, granting preemption rights.

From this résumé of the homestead act it is evident, first, that the land entered continues to be the property of the United States for five years following the entry and until a patent is issued; second, that such property is subject to divestiture, upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own, so far, and so far only,

as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation, and to that extent the act limits and modifies the act of 1831, now embraced in Revised Statutes, section 2461. It is equally clear that he is bound to act in good faith to the Government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others who may wish to purchase or enter it.

With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. In this connection, it is said by Washburn in his work upon Real Property (first edition, vol. 1, p. 108):

> In the United States, whether cutting of any kind of trees in any particular case is waste, seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard to the land as an inheritance, and whether doing it would diminish the value of the land as an estate.
>
> Questions of this kind have frequently arisen in those States where the lands are new and covered with forests, and where they can not be cultivated until cleared of the timber. In such case, it seems to be lawful for the tenant to clear the land if it would be in conformity with good husbandry to do so, the question depending upon the custom of farmers, the situation of the country, and the value of the timber. * * * Wood cut by a tenant in clearing the land belongs to him, and he may sell it, though he can not cut the wood for purposes of sale; it is waste if he does.

By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes, but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation. While, as was claimed in this case, such money might be used to build, enlarge, or finish a house, the toleration of such practice would open the door to manifest abuses, and be made an excuse for stripping the land of all its valuable timber. One man might be content with a house worth $100, while another might, under the guise of using the proceeds of the timber for improvements, erect a house worth several thousands. A reasonable construction of the statute—a construction consonant both with the protection of the property of the Government in the land and of the rights of the settler—we think restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber and used for his improvement, and to such as is necessarily cut in clearing the land for cultivation.

While this question never seems to have arisen in this court before, in United States *v.* Cook (19 Wall., 591)—a suit in trover for the value

of timber cut from an Indian reservation—it was held that while the right of use and occupancy by the Indians was unlimited, their right to cut and sell timber, except for actual use upon the premises, was restricted to such as was cut for the purpose of clearing the land for agricultural purposes; that while they were at liberty to sell the timber so cut for the purpose of cultivation, they could not cut it for the purpose of sale alone. In other words, if the cutting of the timber was the principal, and not the incident, then the cutting would be unlawful, and the timber when cut became the absolute property of the United States. Their position was said to be analogous to that of a tenant for life, the Government holding the title, with the rights of a remainderman.

In the courts of original jurisdiction, it has been uniformly held that a similar rule applied to homestead entries. (United States *v.* McEntee, 23 Internal Revenue Record, 368; United States *v.* Nelson, 5 Sawyer, 68; The Timber cases, 11 Fed. Rep., 81; United States *v.* Smith, 11 Fed. Rep., 493; United States *v.* Stores, 14 Fed. Rep., 824; United States *v.* Yoder, 18 Fed. Rep., 372; United States *v.* Williams, 18 Fed. Rep., 475; United States *v.* Lane, 19 Fed. Rep., 910; United States *v.* Freyberg, 32 Fed. Rep., 195; United States *v.* Murphy, 32 Fed. Rep., 376.) This general concensus of opinion is entitled to great weight as authority.

While we hold in this case that, as between the United States and the settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, we do not wish to be understood as expressing an opinion whether, as between the settler and the State, it may not be deemed the property of the settler, and, therefore, subject to taxation. (Carroll *v.* Safford, 3 How., 441; Witherspoon *v.* Duncan, 4 Wall., 210; Railroad Co. *v.* Prescott, 16 Wall., 603; Railroad Co. *v.* McShane, 22 Wall., 444; Wisconsin Ry. Co. *v.* Price County, 133 U. S., 496.)

As the land in question continued to be "the land of the United States," within the meaning of section 2461, the first question must be answered in the negative and the second in the affirmative.

Teller *v.* United States.

Circuit court of appeals, eighth circuit (113 Fed. Rep., 273).

1. Public Lands—Timber—Cutting—Intent—Misdemeanor—Charge.

   Under Rev. St., 1878, § 2461, 20 Stat., 89, and 27 Stat., 348, making it a misdemeanor for any person to cut timber on any lands of the United States situate in any of the public-land States with intent to export or dispose of the same, where the cutting is admitted, the only intent necessary to show is the intent to export or dispose of the timber.

2. Same—Evidence—Purchase of Other Lands.

   On the trial of one accused of unlawfully cutting timber on land of the United States, evidence that about the time of the cutting defendant purchased and paid for the full quantity of similar land, which he could purchase under the act of June 3, 1878, is inadmissible to show that he would not intentionally commit a trespass.

3. Same—Violation of Law—Custom.

On the trial of one accused of unlawfully cutting timber on land of the United States, evidence of a custom in that locality, known to the General Land Office, of entering on land and cutting the timber therefrom before patent was obtained, is inadmissible, since a custom to violate the law can not justify itself.

4. Same—Honest Intent.

Where a defendant unlawfully cut timber on public land the fact that he acted in accordance with a general custom in that locality is not evidence of an honest intent on his part.

5. Same.

Where defendant unlawfully cut timber on public land, the fact that before cutting he endeavored to ascertain whether the land was surveyed, and also notified a special agent of the Government that he was cutting the timber, and was not warned off for three weeks, is not evidence of an honest intent.

6. Same—Charge.

On the trial of defendant for unlawfully cutting timber on public land, court charged that, in order to convict, the jury must find that there existed in his mind a willful and wrongful purpose to obtain the timber in violation of law; and that if he entered on public land, knowing it was such, without having complied with the provisions of law giving him a right to do so, and cut timber therefrom, they would be authorized to find the requisite criminal intent. *Held*, that such charge fairly stated the law and was as favorable to the defendant as he was entitled to.

7. Same—Evidence—Intent.

Where defendant admits that he had cut timber on 300 acres of unsurveyed Government land, to which he had no claim or color of title, and there is evidence that he was informed by the register of the land office that he could not acquire title because the lands were not open to entry, and that he promised his workmen that he would stand between them and the Government, and that he had fully exhausted all his privileges of purchasing such lands, the intent constituting the offense of unlawfully cutting timber on Government land, defined by Rev. Stat., § 2461, and act June 3, 1878, is sufficiently shown.

8. Same—Application to Purchase—Right to Cut Timber Before Patent—License to Cut.

An occupant of a mineral claim, who has applied for a patent before the purchase price is paid and before he receives a certificate, has no right to cut the timber on such claim with intent to export or remove the same, and a license from him to so cut the timber is no protection to the licensee as against the Government.

9. Same—Mineral Claim—Separation from Public Domain.

The exclusive right to occupy and work a mineral claim, given to the locator by the mining laws during his occupancy, does not segregate such claim from the public domain so as to exclude such land from the operation of Rev. Stat., 2461, 20 Stat., 89, and 27 Stat., 348, making it a misdemeanor for any person to cut timber on the public lands.

Adams, district judge, delivered the opinion of the court.

On November 25, 1899, a criminal information was filed in the district court of the United States for the district of Wyoming against John C. Teller, the plaintiff in error, charging him with having, between January and September of the year 1898, willfully and unlawfully cut and procured to be cut 150,000 feet of timber growing on

the public lands of the United States in said district with intent to export and dispose of the same.

In due course a trial was had, the defendant found guilty, and sentenced to pay a fine of $1,000.

The statutes under which this information was lodged, section 2461, Rev. Stat., 1878, act of June 3, 1878 (20 Stat., 89), and act of August 4, 1892 (27 Stat., 348), make it a misdemeanor for any person to cut, or procure to be cut, timber growing on any lands of the United States situate in any of the "public-land States" with intent to export or dispose of the same.

The defendant is accused of cutting timber from two certain tracts of public land in Carbon County, Wyo., one located on Cottonwood Creek, and supposed to have been land subject to entry and sale under the act of June 3, 1878, commonly known as the stone and timber act, and the other being a certain mining claim known as the Montezuma Placer.

The record shows that an admission was made by the defendant at the trial "that he cut timber on 300 acres of unsurveyed Government land to which he had no claim or color of title." This admission relates to the cutting on the first-mentioned tract, located on Cottonwood Creek.

The trial court charged the jury that before they could convict the defendant they must find that there existed in his mind "a willful and wrongful purpose to obtain the timber in violation of the law," and also that "if the defendant entered upon the lands of the United States, knowing the same to be a part of the public domain of the United States, and without complying with the requirements of the statute, or attempting to do so, cut, or caused to be cut, timber growing thereon, you will be authorized to find that such cutting was willful and intentional, and, if you do so find, the defendant would be guilty, and you should say so in your verdict." In other words, the trial court practically instructed the jury that the intentional cutting of timber found growing on lands known by the person cutting the same to be a part of the public domain constituted a misdemeanor denounced by law. The defendant takes issue with this declaration, and contends that the jury should have been told that there must have been an actual evil or criminal intent, or bad purpose, amounting to moral culpability, in order to convict, and that the court erred in excluding evidence tending to show that the defendant, although cutting timber from lands known by him to have been public lands, cut the same with an honest purpose.

The particular facts offered to be proved and relied on by defendant to establish such honest purpose with respect to the cutting from the first-mentioned land are as follows: In June, 1898, the defendant entered 160 acres, and four other persons each entered 160 acres of

the same character of lands lying in the near vicinity to those upon Cottonwood Creek now in question, for which defendant paid to the United States the price required by the stone and timber act, namely, $2.50 per acre, or a total of $2,400. Defendant's counsel contend that such purchase by him of similar lands and payment therefor at about the same time as is laid in the information is a circumstance which ought to have gone to the jury as evidence that he would not intentionally commit a trespass for the sake of obtaining timber of the same character a short distance away. We entirely fail to appreciate the force of this contention. The act of June 3, 1878, supra, provides in express terms that the timber lands therein contemplated may be sold to citizens "in quantities not exceeding 160 acres to any one person or association of persons." Defendant had already purchased his full limit of 160 acres, if, indeed, he had not indirectly secured the four other quarter sections above referred to, and conceding that he had paid for that land, it can not be that such fact would have any tendency to show that he had an honest purpose in trying to appropriate other lands.

He had exhausted his right already, and he knew it, and such evidence, in our opinion, would tend to impugn the motive of defendant in trying to secure other forbidden lands rather than palliate his conduct in so doing.

It is next urged that the court erred in excluding evidence of a custom prevailing in the vicinity, where the offense was committed, of entering upon land and immediately proceeding to cut timber therefrom before patent was obtained, and while proceedings to secure the same were pending, and that the custom was known to the General Land Office.

This evidence of custom was offered in connection with an avowal by the defendant of his intention at the time he commenced cutting timber on the tract in question to purchase the same afterwards from the Government.

We entirely agree with the trial court that this evidence was incompetent. A general custom to violate the law can not on any principles of morality or law justify itself. Neither can it justify an individual instance of violation of the law. Neither can knowledge of such violation by an agent of the United States excuse or justify it. If it were otherwise, then the register of the land office at Cheyenne, or any other agent of the Government, and certainly the Commissioner of the General Land Office at Washington, could annul any act of Congress at pleasure. But, it may be said, these observations do not meet the argument that such custom, known to defendant and acted upon by him, is evidence of an honest intent and purpose on his part in doing that which was customary.

Every person is supposed and must be held to know the law. Any

laxity in enforcing this axiomatic and fundamental rule would lead to endless disorder and crime. Teller, therefore, knew, or must be held to have known, that any such custom as is claimed in his behalf was an unlawful custom, amounting in and of itself to a violation of law, and it must also be held, in the light of the facts disclosed by this record, that any such custom, if lawful and competent in other cases, could not be of any avail to him, because, as just seen, he had already exhausted his full privilege of purchasing timber land under the act of 1878, and could not directly in the manner prescribed by Congress, or in any other manner, lawfully acquire any more. If he could not do it directly or lawfully, it is impossible for us to conceive how he can shelter himself under a general custom and thereby justify himself in the attempt to accomplish the same purpose indirectly and unlawfully.

In the case of United States *v.* Mock (149 U. S., 273) the Supreme Court considered a case of trespass for cutting and carrying away timber from public lands. The trial court had charged the jury as follows:

> It is a matter of history that the Government permitted the early pioneers, as they went ahead to make their homes for themselves, to go on the public domain and take such timber as was necessary for domestic use, and although there never was any law or license to that effect, it was done with knowledge of every department of the Government, legislative, judicial, and executive. * * * While I wish you to understand that I am not aware of any license having ever been given in the last sixty years to any party to go on the public domain and cut timber, no court has ever held, and no court would be justified in holding, that these men were all criminals who went on and put up a little mill for the purpose of aiding their neighbors in procuring lumber for domestic purposes.

The court, speaking by Mr. Justice Brewer, commenting on the foregoing observations of the trial court, says:

> The specific portions [of the charge] to which the attention of the court was called at the time and exceptions taken are that which refers to the history of the attitude of the Government toward pioneers and others who took timber from Government lands for domestic use, and that which declared that no verdict could be returned in favor of the Government except for the value of the lumber manufactured. In these there was obvious error. * * * Nor were the observations of the court in reference to the attitude of the Government justifiable. Whatever propriety there might be in such a reference in a case in which it appeared that the defendant had simply cut timber *for his own use or the improvement on his own land*, or *development of his own mine* (and in respect to that matter, as it is not before us, we express no opinion), there certainly was none in suggesting that the attitude of the Government upheld or countenanced a party going into the business of cutting and carrying off timber from Government land, manufacturing it into lumber, and selling it for profit.

The principles enunciated in that case are, in our opinion, irreconcilable with the claims of defendant's counsel in this case.

The defendant contends that the facts shown by the record that he endeavored, prior to cutting any timber on the land in question, to

ascertain whether the land had been surveyed; that while at work cutting the timber he notified one Abbott, a special agent of the Government, that he was so doing; that he received no notice to quit for three weeks thereafter, constitute evidence of an honest purpose on his part, and should have been submitted to the jury on that issue. The principles hereinbefore discussed are, we think, entirely applicable to this last contention. The land was unquestionably unsurveyed public land, and if defendant had prosecuted his alleged honest purpose far enough he would have ascertained that fact. But whether he knew or could have known that it was unsurveyed public land was immaterial. All that he was required to know was that it was public land, surveyed or unsurveyed, and if he knew that, which unquestionably he did, the fact that he endeavored to find out whether it was surveyed or not was quite immaterial, and certainly the toleration of a trespass for three weeks, or for any time for that matter, by a special agent of the Government, whose duty it was not to tolerate it at all, can be of no avail to a trespasser by way of showing that his trespassing was done with an honest purpose.

So far we have treated the several contentions of defendant's counsel as if it was competent for him to disprove an actual bad purpose or evil intent; in other words, as if it was incumbent on the Government to show a bad purpose or evil motive in the mind of the defendant in committing the trespass complained of. We have considered the excluded testimony on that theory (and even on that theory we have been unable to find any substantial error in the rulings of the court), but in so doing we have given the defendant the benefit of a position which, in our opinion, is unwarranted by the law.

For the purpose of protecting the public domain from the invasion of trespassers, Congress denounced as a crime the cutting of timber on public land "with the intent to export and dispose of the same." This is the intent that is made criminal by the law and the only intent necessary to establish the crime in a given case.

This intent is fully admitted in the present case. It is undisputed that the defendant cut the timber in question for the purpose of fulfilling a contract with the receivers of the Union Pacific Railroad Company for the delivery of 250,000 ties at Fort Steele.

It has been held by the Supreme Court in Stone v. United States (167 U. S., 188) that it is necessary in prosecutions under the statute now in question to prove a criminal intent "*or at least that* (defendant) *knew the timber to be the property of the United States.*"

The elements of the offense charged against the defendant are three in number: (1) Cutting timber; (2) from land known to be public land; and (3) with intent to export or dispose of the same.

These three elements concurring, the crime, in our opinion, is complete and the jury would be fully justified in finding, and indeed it would be their duty to find, all the criminal intent required by the act.

The trial court charged the jury that in order to convict they must find that there existed in the mind of the defendant a "willful and wrongful purpose to obtain the timber in violation of the law." Taken by itself this portion of the charge would have been misleading, but taken in connection with other portions of the charge, to the effect that if the defendant entered upon public land knowing it was such, without having complied with the provisions of the law giving him a right to do so, and cut timber therefrom, the jury would be authorized therefrom to find the requisite criminal intent, it fairly stated the law to the jury, and certainly as favorable to the defendant as he was entitled.

The admission of the defendant at the trial that he had cut timber on 300 acres of unsurveyed Government land to which he had no claim or color of title; the evidence of E. M. Johnston, register of the land office at Cheyenne, that he had informed the defendant prior to his cutting the timber that he could not acquire title to the lands because they were not open to entry; the testimony tending to show that defendant promised his workmen, when they called his attention to the fact that the lands were public lands, to stand between them and the Government; and the further important fact that defendant had fully exhausted all his privileges of purchasing land under the stone and timber act, all conduce to show, and, in our opinion, satisfactorily show, that defendant well knew the land was public land and had all the criminal intent required by section 2461, Revised Statutes, and the act of June 3, 1878, to constitute the offense there denounced.

In our opinion, none of the facts relied upon by him as evidence of an innocent intent or purpose were relevant or material to the case.

The next assignments of error relate to the cutting of timber by the defendant on the Montezuma placer claim, and arise on the following state of facts: One Mullison had been in possession of the Montezuma placer claim, working the same for the precious metals therein for about thirty years prior to 1898, but he had never applied for a patent or taken steps to acquire title from the United States prior to that day.

In October of that year Mullison and the defendant entered into a contract by which it was agreed that defendant, in consideration of being permitted to cut all the tie timber growing thereon, should pay all the expenses, including the Government price of $2.50 per acre for securing a patent by Mullison to his claim. Pursuant to this agreement Mullison, early in January, 1898, applied for a patent, and between that day and June 22, 1898, defendant proceeded to cut and did cut over about 300 acres of the claim, and advanced money amounting to about $2,000 for the payment of the expenses and purchase price of the land from the United States. On June 22, 1898, the payment was made and Mullison secured a receiver's receipt for the same, entitling him in due course to a patent for the lands. The contention

of defendant's counsel based on several assignments of error relating to the exclusion of evidence and the court's charge, to which particular reference need not now be made, is that his cutting timber from this land after the application for a patent was made, and before the money was paid and a receiver's certificate secured, does not constitute an offense under the statutes of the United States. His proposition is that the ultimate payment of the money, and securing the receiver's receipt, conferred upon Mullison a title to the land which by relation operated as of the date of the application, and in fact as of the time of his original location of the claim, and, therefore, that the cutting of timber at the time in question with the consent of Mullison constituted no violation of the laws of the United States.

It may be conceded that the payment for the land conferred upon Mullison an equitable title to the same, which entitled him to a patent, and that he was not required to wait for the actual issue of a patent converting the equitable right into a legal title before exercising all the incidents of ownership.

This, we think, is the law as established by the authorities: Witherspoon *v.* Duncan (4 Wall., 210); Stark *v.* Starrs (6 Wall., 402, 417); Deffeback *v.* Hawke (115 U. S., 392, 405); Cornelius *v.* Kessel (128 U. S., 456, 460); Hastings, etc., R. R. Co. *v.* Whitney (132 U. S., 357, 361); Benson Mining and Smelting Co. *v.* Alta Mining and Smelting Co. (145 U. S., 428); Bardon *v.* Railroad Co. (145 U. S., 535); Bogan *v.* Mortgage Co. (11 C. C. A., 128; 63 Fed., 192), and the contention of the Government in this case, to the contrary, is not well founded.

The foregoing cases are, however, no authority for the proposition that lands cease to be public lands, or that a claimant secures an equitable right to a patent, until all the acts are performed and all the money is paid by the claimant, which are made by the law prerequisite to securing the legal title.

Mullison, it appears, had located upon and worked his claim for some thirty years prior to 1898, and had thereby under the mining laws secured the right of possession to work the claim for precious metals as long as he desired to exercise that right, and had also acquired the option to apply for and, on certain terms prescribed by law, to secure from the United States a patent conferring upon him title in fee simple to the lands contained in the claim, with all its incidental rights, privileges, and immunities.

It is strenuously argued by defendant's counsel that the possessory title acquired by Mullison, by virtue of the location, record, and working of his claim for so long a time, segregated the same from the public domain and conferred upon him such an equitable right as entitled him or his licensees to all the rights and incidents of absolute ownership. We can not agree to any such proposition.

Three separate rights or titles are recognized by the Supreme Court:

in and to public lands. In Benson Mining Co. *v.* Alta Mining Co., supra, the court quotes approvingly from an opinion of the Secretary of the Interior, as follows:

> By the laws of the United States, three distinct classes of titles are created, namely (1) title in fee simple; (2) title by possession; (3) the complete equitable title.

Title by possession is the first one in order of time acquired. Possession of a mining claim, in accordance with the provisions of the statute, by well-settled authority, confers the right, subject to certain limitations and conditions, upon a locator to work the claim for precious metals for all time, if he desires to do so, but confers no right to take timber, or otherwise make use of the surface of the claim, except so far as it may be reasonably necessary in the legitimate operation of mining.

The next right in order of time is the equitable one, already defined.

The last one in the sequence is the perfect legal title, in fee simple absolute, created by the issue of the patent by the United States.

The claimant may be entirely satisfied with his possessory title and be neither able nor willing to perform the further acts or pay the further consideration requisite to securing the equitable or legal title.

For reasons of public policy and for the purpose of encouraging the mining industry, the United States gratuitously grants the privilege to any citizen, or person having declared his intention to become a citizen, of locating a claim for mineral lands and working the same for precious metals, but it has not seen fit to give away the land containing the minerals, but, on the contrary, has adopted the policy of selling the same to the locator, if he desires to purchase, on terms fixed by the acts of Congress.

Mullison's location, record, and working of his claim secured to him the possessory title only.

While his location so far segregated and withdrew the land from the public domain that no rival claimant could successfully initiate any right to it until his location was avoided and his entry was canceled (James *v.* Germania Iron Co., 107 Fed., 597, 603, and cases there cited; Hartman *v.* Warren, 76 Fed., 157, 160; Kansas Pacific Railway Co. *v.* Dunmeyer, 113 U. S., 629), it gave him nothing but "the right of present and exclusive possession" for the purpose of mining. It did not divest the legal title of the United States or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste. While for the purpose of subsequent entry and location by private parties the lands which Mullison claimed were segregated from the public domain and appropriated to a private purpose, they were so segregated for that purpose only, and the legal and equitable title to them still remained in the Government, and they were still "lands of the United States" within the meaning of section

2461, Revised Statutes, and the act of August 4, 1892 (27 Stat., 348), which are under consideration in this case. (Shiver *v.* United States, 159 U. S., 491, 494.) The case of Belk *v.* Meagher (104 U. S., 279, 283), relied on by defendant's counsel, clearly recognizes the limited character of the right conferred upon a locator. The court there says, page 283:

> The language of the act is that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time." Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an absolute right to the possession, while the paramount title to the land remains in the United States.

The two titles recognized by the United States confer totally different rights. The first one confers a right, and it may properly enough be said to be vested in the locator, to the possession of the land for the purpose of carrying on his mining operations as long as he performs the required conditions. This, however, he may at any time abandon by ceasing to perform the conditions upon which it depends.

The second is a complete and absolute title, which may or may not be acquired by the locator, and if acquired is for other and valuable considerations moving from him to the United States. This title is dependent upon no conditions, but confers all the rights incident to an indefeasible estate in fee simple.

Considerations like the foregoing conclusively show that there is no warrant for the contention that the locator's right of possession segregates the land from the public domain and appropriates it to a private purpose in any such way as to withdraw it from the effect of the provisions of the criminal statutes under which the defendant was convicted.

After the locator shall have applied for a patent, in the event in the exercise of his option he sees fit to do so, and after he shall have fully perfected his entry upon the land by the payment of the purchase price, and not till then, has the land ceased to be a part of the public domain, and not till then has he acquired any vested right to the absolute title. (Witherspoon *v.* Duncan, *supra.*) When such an entry is made the land is not only withdrawn from the public domain, but the entryman has acquired an equitable title, and thereafter and not till then the United States holds the legal title in trust for him.

This brings us to a consideration of the effect to be given to the application for a patent made by Mullison on January 5, 1898, and to the perfection of his entry by payment of the purchase price on June 22, 1898. Between these dates the trespass charged against the defendant was committed.

Counsel strenuously urge that Mullison's actual payment for the land on June 22, 1898, and securing the receiver's certificate of such pay-

ment, conferred title on him by relation certainly as of January 5, 1898, when he applied for the patent. The argument need not here be repeated, nor the authorities again referred to, showing that the payment for the land and securing the receiver's receipt therefor, operated to create a perfect equitable title in Mullison. "The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued." (Benson Mining Co. *v.* Alta Mining Co., *supra.*) But does this title relate to or become effective as of any day prior to the actual payment of the purchase price in any such sense as to entitle the applicant for a patent, or anyone acting under or by his authority, to enter upon the land in the meantime and appropriate the timber to his or their own use? The application for a patent in and of itself imposes no obligation upon the applicant to pursue his purpose to secure a patent. It is only the first step to that end. He is afterwards required by the mining laws to perform certain other prerequisite duties, and particularly to make payment for the land and secure the receiver's receipt therefor.

At any time prior to the actual payment it is within the power of the applicant to abandon his purpose. Can it be possible that Congress intended to open the door to such depredation and fraud as would be feasible on defendant's theory? According to it, Mullison might have made a formal application for a patent, proceeded to sell and dispose of the timber growing on the land, impairing its value accordingly, and then, without penalty, have abandoned his entry, leaving the land wasted and stripped of its timber, which might have been its chief value, for the Government to hold without the probability of sale. Unless Congress by clear and unambiguous expression of its will has left this door open, we will not open it. We not only fail to find any such expression of legislative intent, but authority and reason alike conduce to the contrary. In U. S. *v.* Nelson (5 Sawyer, 68) a case much like the present was considered. A locator of a placer claim had taken all the steps entitling him to a patent for the land except the final payment of the price fixed by law. Afterwards he cut timber therefrom, not incidental to a bona fide mining operation, but for the purpose of selling it as fire wood. The court held that this constituted an offense within the meaning of section 2461, supra, and among other things said:

> The defendant in this case occupies the premises under this law and claims the right to cut and remove the timber therefrom as incidental to and in aid of his right to mine thereon, but he is not the owner of the land until he pays for it and obtains the United States patent. It is a part of the public domain. In the meantime the defendant is occupying it under a mere license from the Government which may be revoked at any time by the repeal of the act giving it. * * * If the land or the greater portion of it is of little or no value as mining ground, but valuable for its timber, the defendant might occupy it for a few years until he had stripped the tract

of its timber and worked out the few acres that really contained valuable deposits, and then abandon it to the Government. * * * The temptation to locate 160 acres of timber land as mining ground, and by putting a few dollars' worth of labor upon it annually, and thereby be enabled to dispose of the timber upon it at from $50 to $100 an acre, is very great, and if the defendant's construction of the law is to obtain, there is nothing to prevent its being done. * * * The removal of timber from a mining claim to be justifiable should proceed pari passu with the operation of mining. Whoever wants to go further or faster than this, and for any reason appropriate the timber to his own use in advance of his mining operations, can only do so safely by paying the purchase price of the land and becoming the owner thereof.

The views so expressed by the district judge in that case commend themselves to our reason, and, it appears, so commended themselves to the reason of the Supreme Court of the United States that that court cites it in support of its decision in the case of Shiver *v.* United States (*supra*).

The law relating to the acquisition of homesteads is so akin to that relating to the acquisition of mineral claims that the principles governing the rights of claimants while engaged in perfecting their titles are conceded by counsel in their argument to be similar.

The homestead settler acquires no title until five years after his entry. During these years he must, among other things, reside upon the land entered and cultivate the same. The performance of such acts, like the final payment by a claimant of mineral land, entitles him to a patent. In homestead cases the rule is well settled that the settler may cut during those five years only such timber as is reasonably incidental to cultivation, and can not, under color of exercising this right, denude the land of its timber for the purpose of selling the same and securing its purchase price. (Stone *v.* United States, 167 U. S., 178; Shiver *v.* United States, 159 U. S., 491; United States *v.* Cook, 19 Wall., 591; Conway *v.* United States, 37 C. C. A., 200; 95 Fed., 615; Grubbs *v.* United States, 44 C. C. A., 513; 105 Fed., 314.)

In the case of Shiver *v.* United States, *supra*, the question turned upon what is meant by "land of the United States" within the meaning of section 2461, Revised Statutes, providing for the punishment of persons guilty of cutting timber upon such lands. After making a résumé of the provisions of the homestead act Mr. Justice Brown, speaking for the court, says:

It is evident, first, that the land entered continues to be the property of the United States for five years following the entry; * * * second, that such property is subject to divestiture, upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own so far, and so far only, as is necessary to carry out the purpose of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultiva-

tion, and to that extent the act limits and modifies the act of 1831, now embraced in Revised Statutes, section 2461. It is equally clear that he is bound to act in good faith to the Government, and that he has no right to pervert the law to dishonest purposes or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others who may wish to purchase or enter it. * * * The settler upon a homestead may cut such timber as is necessary to clear the land for cultivation or to build him a house, outbuildings, and fences, and perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes, but not to sell the same for money except so far as the timber may have been cut for the purpose of cultivation.

The Supreme Court in the last-mentioned case cites a large number of cases determined in courts of original jurisdiction wherein views were expressed in harmony with those stated by the court, and finally concludes that the land of a settler for homestead purposes "remained the lands of the United States within the meaning of section 2461, supra," until tne settler had acquired the right to a patent by the performance of all the conditions necessary under the law to the acquisition of such title.

In our opinion the principles announced in the last-cited case, as well as those recognized or announced in other cases above cited, control the determination of this case and require us to hold that the defendant, Teller, can not justify his cutting of the timber in question, under license from Mullison, prior to the payment by him to the United States of the purchase price of the land from which the cutting was done.

We have not in the foregoing opinion deemed it necessary to take up the assignments of error seriatim, but have adopted the course of discussing the principles contended for, believing that in so doing we could in a general way dispose of the assignments of error more satisfactorily than by considering each separately.

The conclusions reached dispose of each and all of the assignments of error adversely to the defendant and result in an affirmance of the judgment.

The verdict was a general one, and it can not be ascertained from the record whether the jury found the defendant guilty of unlawfully cutting timber from the unsurveyed lands or from the Montezuma placer, or from both, but the conclusion reached demonstrates that there was no error on either hypothesis.

The undisputed facts show that the defendant intentionally cut growing timber from the lands in question, knowing at the time of so doing that they were public lands belonging to the United States, and finding no error prejudicial to the defendant, either in the admission or rejection of evidence, or in the charge to the jury, the judgment of the trial court must be affirmed.

Stone v. United States.

Error to the circuit court for the ninth circuit (167 U. S., 178).

The United States court in the district of Washington has jurisdiction of an action brought by the United States against a defendant, found there, to recover for timber unlawfully cut from lands of the United States in Idaho.

It is no defense against such action that the defendant was indicted criminally for cutting such timber and was acquitted.

* * * * * * *

The provision in the act of March 3, 1875, chapter 152, that the railroad companies therein provided for have "the right to take from the public lands adjacent to the line of said road material," etc., means lands in proximity, contiguous to, or near the road.

As between the Government and a settler, the title to public land until the conditions of the law are fulfilled remains in the United States, but in the meantime if the settler is engaged in improving the land as required by law and disposes of any surplus timber without intent to defraud the Government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the Government, the sale is lawful and the purchaser is protected.

The fact that claimants to lands under the homestead and preemption laws after occupation for a time abandon the lands is not alone proof that they intended to defraud the Government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable ground to believe otherwise, then such sale would be lawful.

* * * * * * *

Opinion of the Court.

The case is stated in the opinion.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought in the District Court of the United States for the District of Washington, Eastern Division, to recover the reasonable value of certain timber and railroad ties manufactured from trees alleged to have been unlawfully cut by the defendant Stone from certain lands in Idaho, of which, it was averred, the United States was the owner.

The answer put the United States upon proofs of all material allegations of the complaint.

But the defendant made two special defenses:

1. That at a term of the United States district court for the district of Idaho, held in April, 1891, the trespasses and wrongs complained of were presented by the United States to the grand jury for investigation, and such proceedings were then and there taken that the grand jury returned into court true bills of indictment, in which each and all of the wrongs and trespasses complained of herein were included; that the defendant was charged thereby with the commission of an

offense against the statutes, forbidding the cutting or removal of timber from the lands of the United States; that on all the charges involving the acts of the defendant as set forth in the complaint filed herein he was tried and acquitted and discharged therefrom by the judgment of that court, and that judgment was duly entered against the Government, "the issues therein being the same as are now presented in this action, and were each and all determined and adjudged in this defendant's behalf." The defendant, therefore, alleged that the issues tendered by the plaintiff herein have been heard, tried, and adjudged for defendant and against the plaintiff by a court of competent jurisdiction, and that such judgment and determination precluded the maintenance of this suit.

2. That between the dates mentioned in the complaint, to wit, between the months of August, 1888, and November, 1890, he had contracts with various customers for supplies of railroad ties and timber for the manufacture of lumber at points along the line of the Northern Pacific Railroad Company in the State of Washington, and adjacent to the region mentioned in the complaint; that he procured his supplies of timber for the purposes aforesaid from lands embraced in the grant made by acts of Congress passed to aid in the construction of the Northern Pacific Railroad, and by contracts with that company, and that at no time did he cut timber on any lands except such as belonged to that company; that during said time he purchased from other parties, who delivered ties and timber suited for lumber on the railroad, both ties and timber not cut by himself, for which he paid the market price, and which were either cut from the railroad lands or were lawfully cut by the parties who sold and delivered them to him; that no part or portion thereof were cut or taken from lands of the United States, or were unlawfully cut or taken from any lands; that the railroad ties so purchased from other parties, and which were not cut by himself from the lands of the railroad company, were for the use of and were used in the construction of the Spokane and Palouse Railway Company and the Central Washington Railway Company's railroads, respectively, both corporations being organized and constructing their roads under and in compliance with grants made by the act of Congress of March 3, 1875, authorizing the use of timber, etc., for construction, to be taken from the public lands of the United States, and that the taking for such purposes was not unlawful, but was by authority of law.

The defense based on the criminal prosecution in the United States district in Idaho was adjudged on demurrer to be insufficient in law.

The United States also brought an action against John H. Stone, Edward Noonan, and W. G. Kegler, as partners doing business under the name of the Spokane Fuel Company, to recover the value of 3,545 cords of wood alleged to have been made from trees unlawfully cut

from the public lands of the United States in the same State, and to have been unlawfully converted and disposed of by the defendants to their own use. Noonan answered denying each and every allegation of the complaint. Stone answered separately, and alleged that "he was indicted upon a charge of cutting timber unlawfully from the same lands and premises, upon which the alleged trespasses complained of in this action are founded, at the April term, 1891, of the United States district court for the district of Idaho; that he was thereafter arrested on that indictment and appeared in said court; that such proceedings were afterwards had, a judgment was duly given and rendered in favor of the defendant, and he has been fully acquitted and discharged of said offense and of said trespass thereby." That judgment was pleaded in full discharge of the plaintiff's cause of action and in bar of all right of action on account thereof. As further special defense Stone denied that the defendants were or had ever been partners in any business. The defense based upon the indictment, trial, and judgment referred to was on demurrer adjudged to be insufficient in law. Stone then filed an answer denying each and every allegation of the complaint. Noonan denied all the allegations of the complaint. Kegler was not served with process and did not appear.

The two actions were tried before the same jury, having been previously consolidated by order of court. In the first case there was a verdict and judgment in favor of the United States against Stone for $19,000. In that case the jury, in answer to special questions propounded by the court, stated that Stone had received saw logs unlawfully taken from the lands described in the complaint, and that $15,000 were awarded as damages on that account. They also stated, in response to a special question put by the court, that Stone had received railroad ties unlawfully taken from the lands, and that $4,000 were awarded on that account. In the case against Stone, Noonan, and Kegler, as partners, there was a verdict against Stone for $3,000, but the judgment was arrested and the verdict set aside.

The judgment against Stone for $19,000 was affirmed by the circuit court of appeals (29 U. S. App., 32).

1. It is contended in behalf of Stone that as the lands from which the trees were alleged to have been unlawfully cut are in Idaho, the action is local to that State, and the district court of the United States for the district of Washington was without jurisdiction. Ellenwood *v.* Marietta Chair Co. (158 U. S., 105) is cited as an authority for this proposition. But that case proceeded upon the theory that the allegations of the petition at the time it was tried presented a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the property was incidental only, and, therefore, that the entire cause of action was local. In the present case the petition, it is true, avers that the United States was the owner

of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and the railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The description in the petition of the lands and the averment of ownership in the United States were intended to show the right of the Government to claim the value of the personal property manufactured from the trees illegally taken from its lands. Although the Government's denial of the ownership of the land made it necessary for it to prove its ownership, the action in its essential features related to personal property, was of a transitory nature, and could be brought in any jurisdiction in which the defendant could be found and served with process. And a suit could have been brought to recover the property wherever it could be found. In Schulenberg *v.* Harriman (21 Wall., 44, 64), it was said:

> The title to the land remaining in the State, the lumber cut upon the land belonged to the State. Whilst the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued as previously the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property.

If a suit like this can not be maintained, then persons depredating on the public lands may escape civil liability by simply removing from the State in which the depredation occurred; whereby the Government would be compelled to rely altogether upon a criminal prosecution in which it could not succeed except by proving the guilt of the defendant beyond all reasonable doubt.

* * * * * * *

4. By the act of March 3, 1875 (18 Stat., 482, chap. 152), Congress granted the right of way through the public lands of the United States to any railroad company duly organized under the laws of any Territory, except in the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of the road; "also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad."

At the trial the defendant offered as evidence the appointment of the plaintiff in error, John H. Stone, as agent of the Central Washington Railroad Company and of the Spokane and Palouse Railway Company, claiming that said corporations, having been organized under the laws of the Territory of Washington, and having filed their articles of incorporation and proofs of organization with the Department of the Interior, which had approved the same, were authorized

by the laws of the United States to take the timber included in this action, and such taking by them through their agent was not unlawful, the proof showing "that the ties which are sued for in this action were used by the said railroad companies in the construction of their said roads." This evidence was excluded and its exclusion is assigned for error. It appears from the record, as stated in the opinion of the circuit court of appeals, that no timber fit for ties was found along the line of either of these roads; that both of them penetrated a barren region almost entirely destitute of timber, and that the timber was cut from lands along the line of the Northern Pacific Railroad about 50 miles distant from the eastern end of the other roads, which was the nearest point where available timber could be found.

The trial court in its charge, thus interpreted the above act of 1875:

> The act of Congress under which this claim is made does not undertake to provide the materials necessary for the building of railroads. It does not provide that if there is not any timber convenient, or within a convenient distance to the building and construction of a new railroad, that the railroad company has a right to require the United States to provide them with material, or go upon distant lands and procure the material that they require. That is not the scope of the law, and so I have decided that adjacent lands means lands in proximity, contiguous to, or near to the road, and that lands so far distant from the railroad and mentioned as lands in Kootenai County, Idaho, where it is claimed that railroad ties were cut, were not adjacent lands within the meaning of the law. That takes the whole question and the whole subject-matter of that claim from your consideration, and releases you from any consideration in regard to it.

We concur with the circuit court of appeals in adjudging this to be a sound interpretation of the act of 1875. It is substantially the view expressed in Denver and Rio Grande Railroad *v.* United States (34 Fed. Rep., 838, 841), in which Mr. Justice Brewer said:

> I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the land is immaterial, or that Congress intended to grant anything like a general right to take timber from public land where it was most convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that if there be no timber on adjacent lands the grant reaches out and justifies the taking of timber from distant lands—lands 50 or 100 miles away.

Under this interpretation of the act of Congress, and under the facts of this case, it is clear that the timber was not taken from lands which, within the true meaning of that act, were adjacent to either of the roads in the construction of which it was used.

5. One of the principal matters contested at the trial was whether the lands were public lands of the United States in any sense that would entitle the Government to claim that it owned the timber taken from them. The defendant introduced evidence to show that certain individuals had acquired the lands under the laws of the United States, and were in the exercise of their rights when cutting timber from them.

Upon this general subject the court instructed the jury, in sub-

stance, that the United States was the primary source of title to all of the lands in the State of Idaho, and where individuals have acquired ownership they have done so by grant or conveyance from the Government; that in a case where there was no evidence of transfer from the United States of title it is to be taken that the title is still in the United States; that as to all lands in which the title is in the Government, the timber and trees standing and growing on them are part of the land, the title of the United States to the trees being the same as its title to the soil; that when trees on such lands are cut down without authority of law the right of property in the timber after it is severed from the realty still remains in the Government, and if anyone without license from the Government or without authority of law takes the timber from the land he commits a trespass against the Government; that no person can acquire title to the timber so cut by buying it from an individual, unless it appears that that individual in cutting and removing it from the lands had license or lawful authority to do so; that under the laws in force during the time referred to in the pleadings and evidence, any person desiring any part of the lands known as public lands must prove that it was for his own exclusive use and benefit and for the purpose of residing upon and cultivating it, thus carrying into effect the policy of the Government in giving public lands to the people who need them and would cultivate and use them, so as to cause the greatest benefit to the country; that any settler going upon a tract of land with that intention goes by invitation of the Government, and with the authority to improve the land and make it fit for use; that he is authorized to cut down the timber which he finds standing there (if it encumbers the ground) so far as was necessary to do so in order to make the land fit for cultivation; that any timber that he does so cut down in good faith and for the purpose of improving the land, he being a bona fide settler intending to acquire title in accordance with the laws, is not the property of the United States, but becomes his property after being so cut down, and that he may burn it up or he may sell it for money, and if he sells it under the conditions named the man who buys it from him gets a good title and is not required to pay the United States for it afterwards; that the converse of that proposition was true, and where a man cuts timber off the public lands, unless he is a bona fide settler intending to acquire title to the lands by obedience to the laws of the United States, he does so unlawfully, and does not make himself the owner of the timber by cutting it; and that even a settler who takes up a claim on public lands, intending to perfect his right to it, has no right until he has perfected his claim to cut the timber, except so far as it is necessary and reasonable to prepare so much of the lands for cultivation as he intends to cultivate.

The court proceeded in its charge:

A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off 40 acres it should be in pursuance to a definite plan that the plow shall follow the ax, and that the entire 40 acres shall be put to use for the purpose of cultivation, or in such manner as a farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a timbered claim, a claim covered by timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith. But a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go and cut that timber by reason of his having filed in the land office a declaration of his intention to take the land under the preemption law than if he goes and cuts it without filing any declaration. Unless the declaration is an honest declaration, and is supported by compliance with the requirements of the law, by making a home upon the land, actually living upon it and actually proceeding in the regular way by regular process of improving the land and putting it in cultivation, and until he has perfected his right by full compliance with the law, he has no right to cut down and sell the timber on other portions of the land which he is not intending to immediately put into cultivation. As between the Government and the settler the title to the land until the conditions of the law are fulfilled remains in the United States, but in the meantime if the settler is engaged in improving the land as required by law and disposes of any surplus timber without intent to defraud the Government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the Government, the sale is lawful and the purchaser is protected. The fact that claimants to lands under the homestead and preemption laws after occupation for a time abandon the lands is not alone proof that they intended to defraud the Government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable ground to believe otherwise, then such sale would be lawful.

It is not, in our judgment, necessary to add anything to this clear and satisfactory statement of the law as applicable to the matters referred to by the trial court. They are in accord with the views of this court as expressed in Shiver *v.* United States (159 U. S., 491, 497, 498). See also United States *v.* Cook (19 Wall., 591). The objections made at the trial (and repeated here) to what was said to the jury on this part of the case were not well taken. They could not be sustained without encouraging depredations upon the public lands under the guise of establishing settlements upon them in accordance with the liberal policy of the Government.

* * * * * * *

Having noticed all the matters in the record that we deem important, and perceiving no error of law to the prejudice of the substantial rights of the defendant, the judgment is affirmed.

CIRCULAR RELATIVE TO TIMBER ON HOMESTEAD ENTRIES.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 15, 1885.

To Registers and Receivers United States Land Offices, and Special Agents General Land Office.

GENTLEMEN: The following rules and regulations are hereby prescribed by the Secretary of the Interior for the protection of the timber growing or being upon public lands covered by homestead or preemption entries; and paragraphs 8 to 10, circular of June 1, 1883, and circular of December 15, 1883, are hereby revoked.

1. Homestead or preemption claimants who have made bona fide settlements upon public land, and who are living upon, cultivating, and improving the same in accordance with law and the rules and regulations of this Department, with the intention of acquiring title thereto, are permitted to cut and remove, or cause to be cut and removed, from the portion thereof to be cleared for cultivation, so much timber as is actually necesssary for that purpose or for buildings, fences, and other improvements on the land entered.

2. In clearing for cultivation, should there be a surplus of timber over what is needed for the purposes above specified, the entryman may sell or dispose of such surplus; but it is not allowable to denude the land of its timber for the purpose of sale or speculation before the title has been conveyed to him by patent.

* * * * * * *

Respectfully, WM. A. J. SPARKS,
Commissioner.

Approved December 15, 1885.

L. Q. C. LAMAR, *Secretary.*

RIGHT OF GOVERNMENT TO TIMBER CUT ON HOMESTEADS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1896.

SIR: Your letter of April 30, 1896, is received, in which you ask, first, if a homestead entryman can, prior to making final proof, contract for the cutting and hauling away, for a consideration, of the cedar timber on his claim, the same to be cut for the purpose of clearing the land for cultivation, and manufactured into shingle bolts. And, second, if the entryman, "to swindle the contractor," should, "after it is all cut and ready to be hauled," refuse to let the contractor remove it "under the pretext" that final proof had not been

made, "could the contractor have the right to take the bolts in payment for his labor," etc.?

You are informed that a bona fide entryman may cut or contract for the cutting of such timber as he wishes to have cleared in the ordinary preparation of his claim for farm purposes. The timber so cut he can sell or dispose of as he may see fit. (See inclosed copy of circular dated December 15, 1885, relative to timber cutting on lands embraced in homestead entries.)

Until patent for the claim issues to the entryman, the timber cut thereon is not his property exclusively. The Government has reversionary rights in the lands, and, in the opinion of this office, the timber cut thereon may not be appropriated or levied upon in satisfaction for any claim which another may hold against the entryman.

The contractor can not, therefore, appropriate the timber or bolts to which you refer in satisfaction for his claim for labor performed thereon. He has his remedy in the local courts, and can there redress his grievance growing out of violation of contract.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Mr. JOSEPH N. CARLSON,
Silver Lake, Cowlitz County, Wash.

PUBLIC-TIMBER PRIVILEGES OF SETTLERS ON UNSURVEYED LANDS.

A bona fide settler upon unsurveyed public land who intends to acquire title to the land under the homestead laws so soon as he is allowed to do so after survey, and who, in good faith, is complying with the rules and regulations relative to residence, cultivation, and improvements, is permitted the same privileges with regard to the cutting of timber upon his claim as are allowed to the bona fide homesteader, and is subject to the same restrictions.

TIMBER ON INDIAN HOMESTEADS.

The rules and regulations governing the use of timber on lands covered by Indian homesteads are the same as those set forth in circular of December 15, 1885, quoted on page 147, with the exception that the restrictions respecting the use of timber remain in force for a period of twenty-five years subsequent to the issuing of trust patent, inasmuch as the title to the land (and, hence, to the standing timber as a part of the realty) acquired under such patent remains inalienable until the expiration of that period, or longer, when the United States is discharged of its trust.

TIMBER ON INDIAN ALLOTMENTS AND INDIAN RESERVATIONS.

(19 Op., 232.)

DEPARTMENT OF JUSTICE,
Washington, January 26, 1889.

SIR: By your letter of the 21st of January, 1889, you ask—

1. Whether an allottee under the act of February 8, 1887 (24 Stat., 388), possesses the right to cut and sell merchantable timber, whether pine or hard wood, standing upon the lands allotted to him, and held under the trust patent by which the title is reserved for twenty-five years or longer to the United States.

2. If such allottees possess the right of sale to any extent, is the Department authorized to exert any control over the disposition of the property, except when the land still remains within an Indian reservation within its jurisdiction under the statute?

The Indians, when organized as tribes under the former policy of the Government, have been treated as domestic dependent nations under the guardianship of the United States. That their condition would be made better if, instead of their separate national organization, with the nomadic and improvident habits incident to it, they were severally qualified, as speedily as possible, for self-reliant citizenship in the several States and Territories and endowed with political rights, is shown to be the conclusion reached by Congress, which inspired the passage of the act to which you refer. The act is intended to change the wandering, improvident, and semicivilized hunter to the domestic, industrious, and enlightened citizen. The first step adopted to promote this end is to give to each Indian a home, with a sense of ownership. The act contemplates that these homes shall, in the first instance, be agricultural. The first industries are to be farming and grazing, as shown by the first section of the act, for the land to be allotted is to be such as is "advantageous for agricultural and grazing purposes." In this contemplated new mode of life the guardianship which heretofore has been exercised over the tribe is to be transferred to the individual allottees provided for in the act. The separate manhood of each Indian is to be recognized, but still subject for a time to the care and supervision of the Government as trustee or guardian. The real estate falling to each allottee is not intended to be used during the period of the guardianship for speculative purposes, but is so conditioned that in their period of wardship and tutelage the Indians shall not be subject to the danger of entering into an unequal competition with the whites in the field of traffic and general business outside of agriculture and grazing. The fifth section of the act provides for two different patents to be given to each allottee for the same land. The first is to be—

Of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such patent is located.

The second is—

That after the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid in fee, discharged of said trust and free of all charge or encumbrance whatsoever.

Prior to the issuing of the second patent the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe. For twenty-five years or longer the obligation exists to see that the intent of the law shall be faithfully carried out and no unlawful waste committed, either by the cestui qui trust or anyone else. During that period the land is intended to be used for agricultural and grazing purposes. Whatever timber may be necessarily cut or used for the promotion of these purposes the trustee should permit. To sell the timber growing on the land, or to cut it for sale for commercial purposes, except such as may be cut in clearing the land or for improvements to be erected thereon, would be inconsistent with the obligation of the trustee to preserve and protect the trust. And the ruling in United States *v.* Cook (19 Wall., 591) would seem to meet this question. The opinion rendered by me July 21, 1885, to the Secretary of the Interior on the question of *leasing Indian lands for grazing purposes* in its logic reaches this proposition.

Your first inquiry is therefore answered, that the allottee does not possess the right to cut and sell merchantable timber, except such as it may be necessary to cut in clearing the land for agricultural or grazing purposes or to erect suitable buildings thereon.

To your second inquiry I reply that by virtue of the legal title remaining in the Government, and the trust relation assumed by it until the second patent is granted, it is the duty of the Department to prevent the cutting of timber except for the purposes above indicated, whether the land is or is not within an Indian reservation.

Very respectfully,

A. H. Garland,
Attorney-General.

The Secretary of the Interior.

See "Timber unlawfully cut on Indian lands" (19 Op., 710), cited on page 60.

See also United States *v.* Cook (19 Wall., 591), cited on page 62.

LANDS VALUABLE CHIEFLY FOR TIMBER NOT SUBJECT TO INDIAN ALLOTMENT.

Department of the Interior,
Washington, December 30, 1895.

Sir: I transmit herewith copy of a communication of the 24th instant from the Commissioner of Indian Affairs, and accompanying applica-

tions, made by Louis Mishler, a Chippewa Indian, for allotments of lands for himself and his four minor children.

As the papers show that the lands in question are more valuable for timber than either agricultural or grazing puposes, and therefore not subject to allotment, said applications are rejected, and you will cancel the same and take such other steps in the premises as may be proper.

Please notify the Commissioner of Indian Affairs of the action taken by your office.

Very respectfully, HOKE SMITH,
Secretary.

COMMISSIONER OF THE GENERAL LAND OFFICE.

BURNED TIMBER ON HOMESTEAD ENTRIES IN WISCONSIN, MINNESOTA, AND MICHIGAN.

[Act of January 19, 1895; 28 Stat., 634.]

AN ACT for the relief of homestead settlers in Wisconsin, Minnesota, and Michigan.

Whereas during the summer and autumn of eighteen hundred and ninety-four extensive forest fires prevailed in northern Wisconsin, Minnesota, and Michigan, resulting in the death of many homesteaders and their families, the destruction of their property and effects, and of much of the green timber growing upon them, which homesteads are valuable chiefly for the timber standing and growing on them; and

Whereas under existing law homesteaders are not allowed to cut or sell green or burned timber, except for the purpose of clearing and improving, and all burned timber not cut within a short period will become worthless and a loss to the settler and the Government: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all such persons actually occupying homesteads in said States of Wisconsin, Minnesota, and Michigan, at the time of such fires, upon claims under the laws of the United States, on lands of the United States, whose property and buildings were destroyed by such fires, and the heirs of all such persons who perished by such fires, and all persons who by reason of such fires and loss of property were obliged to leave their homesteads, are hereby granted two years' additional time in which to make final proof. And temporary absence for any period within two years from the date of this act shall be deemed constructive possession and residence, but shall not be deducted from the time required to make final proof.

SEC. 2. That all persons whose property was destroyed by such fires, and the heirs of all persons who were actual occupants of the homesteads at the time of the fire, and who lost their lives in and by that fire, may, by proving such actual occupancy at the date of such fires,

make proof showing compliance with the law up to the date of the fire, and shall make payment at the minimum price under existing statutes, in the same manner as if such claimants were alive, and upon receipt of such proof of loss of property by such fires, or death of the claimant, heirs surviving, and upon payment as aforesaid, a patent shall be issued to such claimant, or his or her heirs.

SEC. 3. That the claimant upon any homestead, who by reason of not having lived thereon the necessary length of time to enable him to commute under section twenty-three hundred and one of the Revised Statutes as amended by the act of March third, eighteen hundred and ninety-one, his heirs, executor, administrator, or guardian of his minor heirs, may, when the quantity of timber destroyed upon his or her homestead shall not exceed seventy-five thousand feet of merchantable green timber, file an estimate in the land office where such homestead was entered with such reasonable proofs as the Commissioner of Public Lands may prescribe, as to the quantity of timber destroyed upon any sectional subdivision, and thereupon the register and receiver may, under the direction of the Commissioner of Public Lands, issue a license or permit to cut the burned timber on any homestead or sectional fraction thereof, upon payment of the sum of one dollar and twenty-five cents per acre for such sectional subdivision, and the Government shall issue a patent for the same to the claimant or his or her heirs.

CIRCULAR.

(20 L. D., 98.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 2, 1895.

Registers and Receivers, United States district land offices, in Wisconsin, Minnesota, and Michigan.

GENTLEMEN: Your attention is called to the act of Congress approved January 19, 1895, entitled "An act for the relief of homestead settlers in Wisconsin, Minnesota, and Michigan," a copy of which is hereto attached.

The first section provides for an extension of time of two years within which to make final proof, and excuses temporary absence for any period within two years from the date of the act in all cases where any homestead settler, in your respective districts, was compelled to leave the land settled upon by him because of the prevailing forest fires of the summer and autumn of 1894, and by reason of the destruction of buildings or other property by such fires. The same relief is extended to the heirs of any settler who perished by such fires. Any settler desiring to receive the benefit of these provisions will be required to file in the district land office having jurisdiction over the land embraced

in his or her claim an affidavit corroborated by two parties setting forth the number of the entry, if one has been made, and the description of the land; the date of settlement upon the land; the amount and character of the improvements placed thereon; the character and extent of the damage to the settler's property caused by the fire; the date when the same occurred; whether or not the party was thereby obliged to leave the claim, and such other facts as may be relied upon as bringing the party within the scope of the act. Where a homestead settler perished by such fires, the heirs (i. e., the successors to the right under the homestead law, if they desire to receive the benefit of the provisions of said section), or one of them, will be required to furnish evidence consisting of the affidavit of the respective claimants, or, if a minor, of his or her guardian, corroborated by two witnesses, setting forth the number of the entry, if one has been made, and the description of the land; the date of the settlement under which they claim; the character and value of the improvements, and the circumstances attending the death of the settler. The affidavits of the claimant and his corroborating witnesses may be made before any officer authorized to administer oaths using a seal.

Upon receipt of the required affidavits you will forward the same to this office, with your joint recommendation in regard to the case. Should the evidence be found satisfactory you will be so advised, whereupon you will make such notes upon your records for your future guidance as will indicate that the parties are entitled to the benefits of the provisions of the first section of the act, and in these cases you will not issue the usual notice of the expiration of time within which to make proof until *ten* years from the date of the entry, and no contest for abandonment or noncompliance with the law will be allowed against any of the entries until after the expiration of two years from the date of the act. Entrymen temporarily absent for any time within two years from the date of the act will not be required to show any additional period of residence when they make *final* proof, because of such absence, as the act explicitly directs that such absence shall be deemed constructive residence.

Parties coming under the act whose claims rest upon settlement alone are not relieved from the necessity of making their original homestead entries as heretofore required by the law and regulations in order to protect their settlement rights.

The second section provides that homestead settlers whose property was destroyed by such forest fires, or in case the settler perished by the fire, then his or her heirs, or, in other words, the successors to his or her homestead right, as defined in section 2291, Revised Statutes, may, upon satisfactory proof of compliance with the law upon the part of the settler, to the date of the fire, and, upon payment of the minimum price under existing statutes, receive a patent for the land

embraced in the claim of such settler. The procedure in such cases, where the original entry has been made, will be the same as is now required in making homestead proof, except that compliance with the law need be shown only to the date of the fire, and, in addition, proof will be required as to the date of the forest fire and the extent of the damage done to the claimant's property thereby, or, where the settler has perished by the fire, proof as to the time and manner of his death. The payment required to be made for the land is the "minimum price under existing statutes," which in ordinary commutation of homestead entries under section 2301, Revised Statutes, is $1.25 per acre, except where the lands are within the limits of railroad land grants and thereby enhanced in price to $2.50 per acre, and in other cases such amount as is required by any special laws which may govern the disposal of the specific tracts of land.

You will make no change in your method of reporting these entries, but will be governed in each case by the instructions heretofore issued, should there be any entries embracing land of a special character.

In all cases where parties intend to avail themselves of the benefit of the said second section under claims resting upon settlement alone at the time of the fire, they will be required, when they apply to make the original entry, if such application is not made within three months of the date of the settlement, to file affidavits explaining why such entry had not been made sooner, and when parties whose entries have been made since the date of the fire submit proof, as herein required for the purpose of perfecting title to their claims, under the provisions of the said section, you will forward the proof submitted to this office for consideration and withhold the cash certificate until advised that such proof is satisfactory to this office.

Section 3 provides for cases in which the forest fires only partially burned the timber on the homestead, and the settler may desire to purchase only a portion thereof, retaining the remainder to be perfected under the general provisions of the homestead laws.

In such cases, and when the quantity of timber burned does not exceed 75,000 feet of merchantable green timber, the entryman may file with the register and receiver of the district in which his claim lies a sworn statement setting forth the fact that the timber on his claim was destroyed or injured by the forest fires during the summer and autumn of 1894, giving a description of his entry, the date and number thereof, and a description of each of the smallest legal subdivisions of his claim upon which the green timber has been injured or destroyed by said fires, together with an estimate of the amount of such timber so injured or destroyed upon each of said smallest legal subdivisions. Also that he has complied with the requirements of the homestead law up to date. This statement must be corroborated by two witnesses

who have actual knowledge of the conditions existing on the claim. The entryman must designate which of the legal subdivisions of his claim on which the timber was burned he desires to purchase under this act, and with his application to purchase and sworn statement above required he must tender the necessary amount of money to complete the purchase at the minimum price per acre.

Upon the presentation of the above-required application and sworn statement, together with the purchase money, if the same be found satisfactory to the register and receiver, they shall thereupon issue the ordinary cash entry certificate and receipt, giving them current numbers in the regular cash series. On the margin of the certificate, receipt, and duplicate receipt there shall be indorsed in red ink: "Burned timber entry, act of January 19, 1895."

On the back of the duplicate receipt there shall be indorsed the following license or permit to cut the burned timber:

The within-named entryman having complied with the regulations prescribed under the act of January 19, 1895, entitled "An act for the relief of homestead settlers in Wisconsin, Minnesota, and Michigan," is hereby permitted to cut and dispose of the burned timber on that portion of his homestead entry described in this duplicate receipt.

Date ——— ———. ———— ————, *Register.*
———— ————, *Receiver.*

Very respectfully,

S. W. Lamoreux,
Commissioner.

Approved:

Hoke Smith, *Secretary.*

TIMBER FELLED BY STORM ON CERTAIN HOMESTEAD ENTRIES IN FLORIDA.

[Act of February 26, 1897; 29 Stat., 599.]

AN ACT Concerning certain homestead lands in Florida.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons actually occupying homesteads in good faith in any of the following-named counties in said State of Florida, to wit, Alachua, Lafayette, Levy, Suwannee, Bradford, Baker, and Columbia, at the time of the storm on or about September twenty-ninth, eighteen hundred and ninety-six, are hereby granted the right to sell or otherwise dispose of the fallen timber on their homestead entries felled by said storm, and to devote the proceeds of such sale or barter to the improvement of their homesteads or support of themselves or their families.

TIMBER ON SCHOOL LANDS.

[11 Copp's Land-Owner, 134.]

SCHOOL SECTIONS—PUBLIC LANDS—TRESPASS.

School sections in the Territories are public lands, though reserved, and are under the control of the United States. Suits for damages against trespassers thereon may be brought in the local courts by United States officials.

Secretary Schurz to Hon. John Eaton, Commissioner of Education, August 18, 1879.

I have received your letter of the 5th instant, inclosing a letter from Hon. W. H. Beadle, superintendent of public instruction for Dakota Territory, dated Mapleton, Dak., the 15th ultimo, in relation to depredations being committed upon sections 16 and 36 in said Territory, by cutting and removing timber therefrom, and also by cultivating the same for crops as private property.

Mr. Beadle desires to be informed whether sections 16 and 36 in each township of surveyed lands in said Territory are public lands, or whether they are "so under Territorial jurisdiction as to enable us to bring actions in favor of our public-school fund." Section 14 of an act entitled "An act to provide a temporary government for the Territory of Dakota and to create the office of surveyor-general therein" reads as follows:

> And be it further enacted that when the land in said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same. (12 Stat., 239.)

The lands are public lands, although reserved for a particular purpose, and all trespass committed upon them renders the parties guilty of such trespass liable to prosecution under the laws of the United States.

The penalties, however, collected for trespass would not inure to any school fund of the Territory.

The United States has not granted the title to such lands, but has reserved them in order that at some future time, when a State shall be erected out of such Territory, the same may be granted to such State.

In relation to the right of the United States to prosecute for trespasses, I think there can be no question.

Section 2461, Revised Statutes, provides specifically the punishment for cutting and removing timber from the public lands; and while I am not aware of any statute which provides for a rule of damages for using and cultivating lands of the United States which can not, under law, be sold, still I am of the opinion that the United States has the right to recover *mesne profits* for the use of said land.

In the case of Cotton *v.* United States (11 How., 239), the Supreme Court says:

> Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property in the State court or in their own tribunals administering the same laws. As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have.

In the case of the United States *v.* Gear (3 How., 120) it was held that the United States had the right to maintain an action of trespass for taking ore from lead mines. On the same principle I think the Government would be entitled to recover for any other beneficial use to which the public lands might be put. You may, therefore, advise Mr. Beadle that if he will furnish this Department with information as to the cutting and removing of timber from sections 16 and 36, or any other public lands in the Territory of Dakota, giving a description of the tract trespassed upon, and time when trespass was committed, the same will receive prompt attention. You may also advise him that if he will furnish to this Department like information of persons who are cultivating and using such sections, that proper action will be taken thereon.

BOXING TREES ON PUBLIC LANDS FOR TURPENTINE PURPOSES.

All boxing and chipping of trees for turpentine purposes on public lands, whether vacant or covered by unperfected homestead entries, is unlawful.

The use of trees for such purposes on lands covered by unperfected homestead entries can not be considered as constituting such "cultivation" as is contemplated in the second section of the act of May 20, 1862, which has clearly in view the tilling or fertilizing of the soil.

The decisions rendered in the cases of James F. Bailey, J. C. Calhoun, and E. S. Taylor, tried at the April (1888) term of the circuit court, eastern district of Louisiana, established the right of the Government, in cases of turpentine trespass on public lands, to bring criminal proceedings for the stealing and retaining of personal property of the United States, to wit, crude gum, etc., under section 5456 of the United States Revised Statutes, and 18 Stat., 479.

The further right to sue for the recovery of damages in cases of this nature is established by the decision rendered in the following case:

United States *v.* Taylor.

Circuit court, southern district of Alabama (35 Fed. Rep., 484).

Public Lands—Trespass—Right of Government to Sue—Possession—Homestead.

> Possession by a homestead claimant, and a receiver's receipt issued since bringing the action, do not divest the Government of possession or title, so that it can not maintain an action of trespass for cutting timber on the land.

PUBLIC LANDS—BURDEN OF PROOF.

In an action brought by the United States for trespass committed on Government lands the burden of proof is on the Government to show that the acts of trespass complained of were committed by defendant or by his command, or that they were done for his benefit or with his knowledge and consent, and were subsequently ratified by him.

* * * * * * *

SAME—EVIDENCE.

In such a case, evidence that the employees of defendant, under his direction or superintendence, or that of his partner for their joint benefit, entered on the lands described in the complaint and cut turpentine boxes in the trees thereon, or chipped such trees for turpentine purposes, or removed therefrom crude turpentine, is sufficient to warrant a verdict against defendant. But if defendant merely bought turpentine from homestead claimants, having nothing to do with hiring hands, or chipping trees, or dipping or hauling turpentine, further than to pay for this work at the request of said claimants, and deducting the amount so paid from the agreed price of the turpentine, defendant is not liable.

SAME—NOMINAL DAMAGES.

In such a case, merely entering on the land and cutting boxes or chipping trees and removing therefrom crude turpentine entitles plaintiff to nominal damages, though no actual damages were done.

SAME—COMPENSATORY DAMAGES.

In an action for cutting growing trees, if their value can be ascertained without reference to the value of the soil on which they stand, the measure of damages is the injury done them, and not the difference in the value of the land before and after such injury.

SAME—EXEMPLARY DAMAGES.

In such a case the Government is entitled to exemplary damages, if the going on the land and cutting and chipping the trees or dipping and removing the turpentine was done by defendant willfully, or if such acts were the result of a negligence so gross as to show willfulness or a reckless indifference to the rights of the Government.[a]

* * * * * * *

TOULMIN, *J.* (charging jury):

This suit is called an action of trespass, and is brought by the United States against the defendant to recover damages for trespasses alleged to have been committed by him in the years 1883 and 1884 on lands specifically described in the complaint and belonging to the Government of the United States. The United States charges the defendant with the trespass set forth in the complaint. He says he is not guilty of it. Under the plea of not guilty the Government must be prepared to prove the commission by the defendant, his servants, employees, or agents, of the trespass of which it complains. It must be proved that the acts of trespass complained of were done by the defendant or by

[a] As to when exemplary damages may be allowed, see Clarke *v.* Improvement Co., *ante*, 478, and note; Railroad Co. *v.* Roberts (Ky.), 8 S. W. Rep., 459, and note; Railroad Co. *v.* Arnold (Ala.), 4 South Rep., 359; Webb *v.* Gilman (Me.), 13 Atl. Rep., 688, and note; Railway Co. *v.* Garcia (Tex.), 7 S. W. Rep., 802; Haines *v.* Shultz (N. J.), 14 Atl. Rep., 488; White *v.* Stribling (Tex.), 9 S. W. Rep., 81, and note.

his command, or that they were done for his benefit and with his knowledge and consent, and he subsequently adopted and ratified them.

It is not required that the acts of trespass should be proved beyond a reasonable doubt, as in a criminal case. This is a civil suit, and all that is required is that you should be reasonably convinced from the evidence in the case that the defendant is guilty. The plaintiff's case should be satisfactorily proved. It is not necessary that the proof should be conclusive, but must be such as to reasonably convince you. If your judgments are thus convinced, after applying the ordinary tests for the ascertainment of truth, it would be your duty to find a verdict against the defendant. If your judgments are not thus convinced, it would be your duty to return a verdict of not guilty.

Now, to enable a party to maintain an action of trespass he must have either actual or constructive possession of the land trespassed on at the time of the trespass. Constructive possession is such as the law annexes to the title, and will authorize this action. It is undisputed that the United States had the title to the land described in the complaint at the time of the alleged trespass. But it is contended on the part of defendant that the United States were not in such possession of the homestead lands mentioned in the complaint as to entitle them to bring this suit; that the occupancy of said lands by the homesteaders spoken of in the trial gave them the possession, and deprived the United States of the right to bring this particular suit; and it is further contended by the defendant that the receipts of the receiver of the land office, issued since this suit was brought, and which are submitted in evidence, divested the United States of the title to such homestead lands, and vested it in the homestead claimants, and that, for that reason, the United States are debarred from recovering, so far as the homestead lands are concerned.

I charge you that the right of the homesteader is one of occupancy only, but with certain rights and privileges, subject to the right and duty of the Government to protect and preserve the timber on the land. He is not in adverse possession of the land until he is vested with the title to it by the Government. In the meantime he has the privilege of clearing it for cultivation, and of cutting the timber down for that purpose, and such timber may be sold if not needed for improvements; but if sale and traffic is the only reason for cutting the timber on the land, or for removing any material therefrom, the law would be broken, and the person would be a trespasser. Hence I charge you that the United States had, when this suit was brought, and now have, such possession as entitles them to maintain this action; that the receipts of the receiver of the land office are not, of themselves, sufficient evidence that the Government's title has been divested, and that it has vested in the homestead claimants. Until they have made the final proof and acquired the title—that is, so fulfilled their obligations under the law as to entitle them to patents—it is not allowable to them to cut

the timber on the lands, or take any crude turpentine or other material therefrom for the purpose of sale or speculation. The certificate of the receiver and register would be sufficient evidence of their right to a patent, and would be a defense to this action so far as the homestead lands are concerned; but the receiver's receipt alone is not sufficient.

Any person who cuts or removes timber or other material, or who hires others to cut or remove timber or other material, or who incites or induces others to cut or remove timber or other material from Government land, for his personal benefit or advantage, or for the purpose of gain (except he has the right or permission to do so from the Government), is a timber trespasser upon Government lands. And any person who commits timber trespass upon Government land is liable to civil suit for the value of the material taken and the damages sustained by the cutting of the timber. Now, gentlemen, if you believe from the evidence that the employees of the defendant entered on the lands described in the complaint, or any of them, and cut turpentine boxes in the trees on such land, or chipped such trees for turpentine purposes, or removed therefrom crude turpentine, and this was done by his direction or superintendence, or by that of his partner for their joint benefit, it would be your duty to find him guilty in this suit. If he had the right or permission from the Government to do so, it devolves on him to show it. But if you believe from the evidence that the defendant's arrangement with the homesteaders was simply to buy the turpentine from them, he having nothing to do with having the hands hired, or the trees chipped, or the turpentine dipped or hauled from the land, further than to pay for this work at the request of the homesteaders, for and on their account and at their request, deducting the amount so paid from the agreed price of the turpentine, then he would not be liable in this suit as a trespasser on the homestead land.

The evidence before you, and which you are to consider, is both of a positive and circumstantial character, and as a part of this evidence you have a statement in writing of what it is admitted certain absent witnesses would testify if they were present. This admission is that if the witnesses were personally present they would testify to the facts stated. This statement of the facts the witnesses would prove stands in the place and is the substitute for the oral testimony the witnesses would give if personally present. The witnesses being personally present, the evidence given by them would be subject to contradiction, and the substitute for that evidence is equally open to contradiction. There is some conflict of evidence in this case. It is your duty to reconcile it, if you can, so as to make all the witnesses speak the truth. If you can not do this, if you find it impossible to harmonize the testimony, then it is for you to say which you will believe and which you will disbelieve, which you will accept as true and act upon and which you will reject.

In determining this question you will look at the other facts and circumstances as shown by the evidence, and see which of the witnesses has been corroborated or sustained by these facts and circumstances; what interest they have, or what motives actuate them in testifying one way or the other; what means and opportunities they had of knowing what they have testified to. Now, when you have considered all these things, you say where the truth is; for you, gentlemen, are the exclusive judges of the sufficiency and weight of the evidence in this case. You say what weight you will give it, both positive and circumstantial, and whether it is sufficient to reasonably satisfy you that the defendant had turpentine boxes cut or trees chipped on the lands described in the complaint, or any of them, and had removed therefrom the crude turpentine; and it would be equally a trespass if he entered on the land and chipped trees and removed therefrom crude turpentine which accumulated in boxes which had been before cut in the trees by other persons, if you should find from the evidence that there were any such.

Now, if you believe from the evidence that the defendant's employees entered on the lands described in the complaint, or any of them, and cut boxes in the trees thereon, or chipped the trees, and removed the crude turpentine therefrom, nominal damages would be recoverable, even though no damage in fact was done. The theory of a suit like this is that the breaking of the "close" (as it is called) is the cause of action. Breaking into the close of another means an unauthorized intrusion into the land of another, and this will authorize nominal damages in any event; and any injury to the timber on the land, either by boxing or chipping or any removal of crude turpentine therefrom merely enhances the damages, and all damages which naturally result from the wrongful act, and are directly traceable thereto, are recoverable. In an action for damages in cutting growing timber or trees the recovery is not limited to their actual value for firewood, turpentine purposes, or for timber or lumber purposes, but the actual injury to the estate by the cutting of the trees; and in determining the question it is proper to show the purpose for which the trees were designed and could have been used. If the trees, although they are part of the realty, have a value which can be accurately measured and ascertained without reference to the soil on which they stand, the recovery may be of the value of the trees destroyed (if any were destroyed), or of the injury done to them, and not for the difference in the value of the land before and after such injury. You determine the value of the trees after cutting and working, with reference to the peril to which they were then exposed from fire, ravages of worms, or decay, caused or traceable to the trespass of the defendant, if he committed any. The inquiry is, What is the amount of injury which the Government

has suffered from the whole trespass taken as a continuous act?—going on the land, cutting the trees, chipping them, and removing the crude turpentine therefrom, during the years 1883 and 1884.

Now, it is claimed here that the Government is entitled to more than actual damages; that exemplary damages, or "smart money," as it is called, should be given. If the going on the land and cutting and chipping the trees, or the dipping and removing of the turpentine, was done by the defendant willfully, or was the result of negligence so gross as to show willfulness or a reckless indifference to the rights of the Government, you may, in your sound discretion, go beyond the boundary of mere compensation for the injury done and award exemplary damages. Now, gentlemen, take the case. Ascertain from the evidence what the truth is as to the guilt or innocence of the defendant, and as you find that truth so let your verdict be. And if you find the defendant guilty, say by your verdict what damages the Government is entitled to recover from him for the injury done.

Special Agent R. A. Vancleave to Commissioner General Land Office, November 28, 1888.

In the United States court for the southern district of Mississippi, November term, 1888, * * * His Honor Judge R. A. Hill ruled in the cases tried at this term of said court as follows:

When the purchaser bought crude gum with a knowledge of the trespass, he was liable for the manufactured value without deduction for the expense of manufacturing. That an innocent purchaser of crude gum, without knowledge of the trespass, from a willful trespasser is liable only for the value of the crude gum at the time of the purchase, and that the price paid by said purchaser is the amount the Government is entitled to recover.

INJURY, PRESENT AND PROSPECTIVE, INFLICTED UPON TREES BY "BOXING," ETC.

(4 L. D., 1.)

In determining the amount of damages resulting from "boxing" trees for turpentine, the injury, present and prospective, inflicted upon the trees should be included.

Acting Secretary Muldrow to Commissioner Sparks, July 1, 1885.

I am in receipt of your letter of the 15th of June last, inclosing report of Special Agent Griffin, dated June 4, 1885, relative to the matter of the measure of damages in case of trespass by "boxing" trees upon the public land for turpentine.

For years past the Department has at intervals been called upon to examine into cases of turpentine trespass presented for its action, and has, as a general rule, recommended suit for the recovery of the value

of the material taken. Experience, however, clearly shows that such action has entirely failed to accomplish the suppression of such unlawful operations. Parties against whom judgments have been obtained have continued to violate the law even upon an enlarged scale, defying the agents of the Government to their faces, and other parties in the immediate vicinity have entered upon the work of destruction, in no way deterred by the punishment previously visited upon their neighbors.

The report of Agent Griffin, full and explicit as it is, simply corroborates the information already received from other sources, that a pine forest, when used as a "turpentine orchard," is doomed to entire destruction. A "box" or gash is cut into the side of a tree, perhaps 10 inches wide and 6 inches deep, and of such a shape as to catch and retain a considerable quantity of the crude turpentine gum. The next year another "box" is cut at another point in the circumference of the tree, and so on. Besides this, the tree is subjected to a "chipping" process, the bark being cut through down into the woody portion for 12 or 18 inches above the upper edge of the "box," in order to keep a fresh bleeding surface continually exposed. In four or five years the life of the tree is exhausted. Even should the process of "boxing" be discontinued decay will ensue from the action of the weather and worms upon the portion of the wood already exposed. There can be no healing process and no future growth to a pine tree once tapped by the turpentine gatherer's ax. Drippings of gum accumulate in the "boxes" and about the root of the dying tree. From the carelessness of some traveler or from lightning striking some tree in the forest fires originate and the entire timber is consumed. After its destruction the land will be covered in a few years with a growth of worthless scrub oaks, rendering it entirely valueless.

In view of these considerations I concur in your opinion that the measure of damages heretofore estimated in such cases, based upon the value of the material procured, is insufficient to indemnify the Government for the actual loss resulting from the boxing of trees for turpentine; and you are hereby authorized and directed to assess upon depredators of this class hereafter a measure of damages which shall include the injury, present and prospective, inflicted upon the trees which have been subjected to the operation.

TIMBER UPON ACCRETIONS THAT ARE PUBLIC LANDS.

Accretions formed by washing or recession become part of the lands they adjoin.

Removing timber from accretions that are public lands, except for improvement of the same or other domestic use, is trespass upon such lands, and liable to punishment as such. (See 1 L. D., 596.)

TIMBER FOR RAILROAD PURPOSES.

[Act of March 3, 1875; 18 Stat., 482.]

AN ACT granting to railroads the right of way through the public lands of the United States.

Be it enacted, etc., * * * That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road: also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; * * *

* * * * * * *

SEC. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

By the above act all duly organized right-of-way railroads are authorized to take timber from the public lands adjacent to the line of the road for construction purposes. All land-grant railroads are likewise authorized, in the several granting acts, to take timber from the public lands adjacent thereto for construction purposes. The act of September 29, 1890 (26 Stat., 496), forfeited the grants to all uncompleted railroads to the extent of the grants for the unconstructed portions of such roads.

No authority is granted to take public timber for use as fuel or for repairs, except in the case of the grant to the Denver and Rio Grande

Railway Company by the act of June 8, 1872 (17 Stat., 339), which allows the taking of public timber for purposes of repair on the portion of the line constructed thereunder.

Under these acts timber can only be taken from public lands for railroad purposes by the railroad companies direct, through their contractors or duly appointed agents.

No timber may be taken from public lands for the purpose of selling the same to a railroad company. No railroad company is authorized by the above acts to procure or cause to be procured timber from public lands for sale or disposal either to other companies or to the general public.

LANDS ADJACENT, ETC.

STONE *v.* UNITED STATES.

Circuit court of appeals, ninth circuit (64 Fed. Rep., 667).

* * * * * * *

RAILROAD COMPANIES—CONSTRUCTION OF ROAD—RIGHT TO TIMBER ON ADJACENT PUBLIC LANDS.

Act of March 3, 1875 (18 Stat., 482), which grants to railroad companies the right of way through public lands and the right to take from the public lands "adjacent to the line of said road" timber necessary for its construction, does not authorize the taking of timber for the construction of a road from public lands 50 miles distant from the road.

See also United States *v.* Henry Hazlett, cited on page 119; Stone *v.* United States, cited on page 140, and United States *v.* St. Anthony R. R. Co., cited on page 174.

UNITED STATES *v.* LYNDE ET AL.

Circuit court, district of Montana (47 Fed. Rep., 297).

PUBLIC LANDS—NORTHERN PACIFIC RAILROAD—RIGHT TO CUT TIMBER FOR CONSTRUCTION.

Act Congress, section 2 (13 Stat., 365), granting to the Northern Pacific Railroad Company "the right, power, and authority * * * to take from the public lands adjacent to the line of said road, material of earth, stone, timber, etc., for construction thereof," was not intended to apply only to public lands contiguous to or adjoining the line of the road, but may extend to other lands.

SAME—USE OF TIMBER ON ANY PART OF LINE.

Timber taken from lands adjacent to the line of the railroad may be used for construction upon any part of it.

DENVER & R. G. R. R. CO. *v.* UNITED STATES (two cases).

Circuit court, district of Colorado (34 Fed. Rep., 838).

PUBLIC LANDS—LICENSE TO RAILROADS TO CUT TIMBER.

Act Congress June 8, 1872 (17 Stat., 339), granted to the D. & R. G. R. R. Co. the right to take stone, timber, etc., from public lands for the construction and repair of its railway, provided it was completed within five years from its pas-

sage; and in case of default the act was to be null and void as to the unfinished portion of the road. This act was amended to change the five years to ten. By act Congress March 3, 1875, a general grant to railroads was made similar to the special grant of the act of 1872, except that it limited the right to material to that necessary for the construction alone. *Held* that the D. & R. G. R. R. Co. was entitled to the privileges of both acts.

SAME—PLACE OF USE.

Where a railroad has the right to take timber from the public lands adjacent to its right of way to use for purposes of construction, it can take timber so obtained to any point of the line, however distant from the place of cutting.

SAME.

For the rights granted under the general act of 1875, the portions of the D. & R. G. R. R. built before and after June 8, 1882, are to be treated as one road, and timber can be taken from the entire line for the construction of any portion of the line provided for in the original organization.

SAME—PURPOSES OF USE.

Under these acts section and depot houses, snowsheds, and fences are a part of the railroad.

SAME—REPAIRS.

Under these acts no timber can be taken from the public lands for the repair of any portion of the D. & R. G. R. R. Co.'s tracks not completed before June 8, 1882, and for that portion only from the lands adjacent thereto.

SAME—ADDITIONS.

After a railroad line is once completed it has no right under act Congress March 3, 1875, to take timber from the public lands to build new switches and side tracks.

Error from district court, district of Colorado; Hallett, judge.

The United States, plaintiff, sued the Denver and Rio Grande Railroad Company and others, defendants, in two suits, for cutting timber illegally on the public lands. Judgment for plaintiff, and defendants bring error. Both suits were consolidated.

BREWER, C. J.:

These two cases come here on error from the district court, judgments having been rendered there in favor of the United States and against the plaintiff in error for the full amounts claimed. Each case was tried on an agreed statement of facts. On June 8, 1872, Congress passed an act making a grant to the Denver and Rio Grande Railway Company (17 Stat., 339). The material portion of that grant is as follows:

That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line be, and the same are hereby, granted and confirmed unto the Denver and Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado, its successors and assigns: * * * *Provided*, That said company shall complete its railway to a point

on the Rio Grande as far south as Santa Fe within five years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road.

Subsequently this proviso was changed so as to give ten years instead of five (19 Stat., 405). On March 3, 1875, Congress passed an act making a general grant "to any railroad company duly organized under the laws of any State or Territory," etc., which grant, for all questions that arise in this case, is similar to the special grant to the Denver and Rio Grande, except that in the general grant the right to take material, earth, stone, and timber is limited to what may be necessary for the construction, and not, as in the special grant, for construction and repairs.

The agreed statement of facts in the first case is as follows: That it is agreed—First, that the timber sued for in said action was cut by William A. Eckerly & Co., as agents for the Denver and Rio Grande Railway Company, and delivered to said railway company. Second, that the attached statement correctly shows the kinds and amounts of timber so cut and delivered, and also shows the time of cutting, the purposes for which it was cut and used, and the prices paid for cutting and delivering the same. Third, that said timber was cut in Montrose County, Colo., and near the town of Montrose, and upon public, unoccupied, and unentered lands of the United States. Fourth, that the lands from which the timber was cut were along and near and adjacent to the line of railway of said company. Fifth, that the portion of the line of railway through said county of Montrose, and in the vicinity of said town of Montrose, was not constructed or completed until after June 8, 1882, and that on June 8, 1882, said line of railway was only constructed and completed as far westward of Cebolla, in Gunnison County, Colo. Sixth, that said company had not completed its line of railway to Santa Fe on June 8, 1882, nor has it ever so completed it. Seventh, that of the timber cut as aforesaid a part was used on portions of the line of railway out to Grand Junction, constructed and completed after June 8, 1882, and for the purpose of construction of railway, erection of section and depot houses, snowsheds, fences, etc., and a part was shipped by the Denver and Rio Grande Railway for similar purposes to the Denver and Rio Grande Western Railway, to be used in the Territory of Utah, as shown in attached statement; and $1,000 worth was used for repairs on portions of road completed prior to June 8, 1882. Eighth, that as to all of its line of railway constructed after June 8, 1882, the said company strictly complied with all the requirements of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." Ninth, that upon the foregoing agreed statement of facts the following questions are to be submitted to the court

for decision: (*a*) Whether under the act of June 8, 1872, and an act of March 3, 1877, amendatory thereof, the Denver and Rio Grande Railway Company had a right to cut timber for any purposes on public land of the United States adjacent to portions of its line of railway constructed and completed after June 8, 1882. (*b*) What are "adjacent" lands within the meaning of the act of Congress approved June 8, 1872, entitled "An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," and the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States?" (*c*) Whether under said acts said company could cut timber on public lands of the United States adjacent to the portions of the line of railway completed subsequently to June 8, 1882, to be used for purposes of repair and for station and section houses, and for fences and snowsheds on those portions of said railway line constructed and completed prior to June 8, 1882. (*d*) Whether under such statutes said railway company could cut timber from public lands adjacent to portions of the line of railway completed after June 8, 1882, to be used for any purposes on portions of the line of railway constructed and completed after June 8, 1882, and if so, for what purposes? (*e*) Whether the terms of the statute giving said railway company the right to take timber "for the construction and repair of its railway lines" would in any wise comprise and comprehend the erection, building, and repair of section and depot houses, snowsheds, fences, and rolling stock. (*f*) Had the said railway company the right, under the act of March 3, 1875, to take from adjacent public lands material—earth, stone, and timber—necessary for the construction of its railroad? (*g*) To what extent and for what amount the Denver and Rio Grande Railway Company is responsible for timber cut as aforesaid and shipped to Utah for use on the Denver and Rio Grande Western Railway. (*h*) To what extent and for what amount said railway company is liable, if at all, upon the above agreed statement of facts and upon the law as it shall be decided by the court. Tenth, that this case is a test case to obtain a definite and positive adjudication by a court of competent jurisdiction of the various points set out above and of the rights of said railway company with regard to cutting timber from public lands under the act of June 8, 1872, under the amendatory act of March 3, 1877, and under the act of March 3, 1875. Eleventh, that judgment shall be entered by the court upon the foregoing statement of facts, and upon the law as it shall decide it, and at a valuation for said timber as set out in the annexed statement. Twelfth, that the admissions made in this statement of facts shall bind the parties hereto only for this suit, and shall not bind them as to any other matter or case.

There is some dispute between counsel as to the questions that are involved in and presented by these facts. I shall not attempt to con-

sider any that I do not think are fairly and clearly presented by the facts. The fourth paragraph stipulates that the lands from which the timber was cut were adjacent to the line of railway; hence I shall not stop to consider how near land must be to be adjacent - whether half a mile or ten miles. I certainly do not agree with the idea which seems to be expressed elsewhere, that the proximity of the lands is immaterial, or that Congress intended to grant anything like a general right to take timber from public land where it was most convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that, if there be no timber on adjacent lands, the grant reaches out and justifies the taking of timber from distant lands—land fifty or a hundred miles away; nor do I understand that the rule controlling the construction of ordinary public grants, to the effect that they are construed strictly against the grantee, does not apply to these grants.

The first question is whether the railroad company can avail itself of both the special act of 1872 and the general grant of 1875. It was held by the district judge that it could, and I agree with him in that conclusion. It is unnecessary to do more than refer to the opinion filed by my brother Hallett for sufficient reasons for his conclusion. The principal question, however, is this: My brother Hallett was of the opinion that the place of use of the timber on the line of the railway was to be considered as well as the place of cutting in determining the rightfulness of the appropriation by the company. He thought that the right to cut timber extended to only so much timber as should be used in the construction of the road opposite, or nearly so, to the place of cutting; that if timber should be cut within a half mile of the road, and then carried on the cars of the company a hundred miles, and there used in the construction of the road, it could not be said to be taken, within the purview of the act, from adjacent lands. So he concluded that the right to take timber was limited by the place of use, and that, as each section of the road of reasonable length was completed, the right to take timber on lands adjoining such section was gone. In other words, the grant of timber was exhausted pari passu with the construction of the road. In this view, with all deference to the learned judge, I think he was mistaken.

While grants of this nature are to be strictly construed, they are to be fairly construed, and so as to carry into effect the intent of the grantor. In determining what is granted we of course look first to the language used. Now, in these grants the place of cutting, as well as the use to which the timber cut may be put, are both expressed. The place is the public lands adjacent to the line of the road. The use is the construction of the railroad, not a part of the railroad, but of the railroad as a whole, and of course including therein every part of it. It does not purport to grant the right to take timber from adjacent pub-

lic lands for use in the construction of the railroad opposite the place of cutting, and these last words will have to be implied in order to place the limit on the grant given to it by the district judge. It would have been so easy to use such words of limitation that their omission makes strongly against an intent of such limitation. Let me make an illustration. Suppose the owner of a section of land made a grant to a railroad company of a strip 50 feet in width through his land for a right of way, and by the same instrument granted to the company the right to take stone and earth from land near this right of way for the purpose of constructing its road. This would be precisely parallel to the case at bar, the difference being only one of size. Now, would it be contended that under such a grant the company was limited for each rod of distance to the stone and earth which might happen to be opposite such rod? Would not a fair and reasonable construction, one expressing the intent of the grantor, be that the company could take stone and earth from any place which was near to the right of way for use in the construction of any part of the road through the section? If that would be true in the lesser illustration, would it not also be true in the larger case before us? Can it be that Congress intended to aid in the construction of only a part of the railroad? It must have known that there were large extents of territory in this Western country treeless and without suitable stone for culverts and bridges. Did it mean to aid in the construction of such part of the road as ran through a timber country, or where there was suitable stone, and leave the company unaided in the construction of other parts? It seems to me both the language of the statute and the intent of the grantor are against the views entertained by my brother Hallett.

But, beyond this, the decision of the Supreme Court in the case of U. S. *v.* Railroad Co. (98 U. S., 334) seems to me decisively against those views. In that case the facts were these: By the nineteenth section of the act of July 2, 1864, there was granted to the railroad company for the purpose of aiding in the construction of its road every alternate section of public land (except mineral land), designated by odd numbers, to the amount of 10 alternate sections per mile on each side of the road on the line thereof not reserved, etc. By the twentieth section, whenever 20 consecutive miles were completed and accepted patents were to be issued to the company for land on each side of the road to the amount designated. It was contended that this grant was to be measured by the separate sections of 20 miles of road, and that, to fill out the grant, land must be taken opposite each section, respectively. But the court ruled otherwise, and held that the grant was in aid of the construction of the road as a whole, and might be filled out by lands anywhere along the line. I quote the language of the opinion:

> The position that the grant was in aid of the construction of each section of 20 miles, taken separately, and must be limited to land directly opposite to the section,

is equally untenable. The grant was to aid in the construction of the entire road, and not merely a portion of it, though the company was not to receive patents for any land except as each 20 miles were completed. The provision allowing it to obtain a patent then was intended for its aid. It was not required to take it; it was optional for it then, or to wait until the completion of other sections or of the entire road. The grant was of a quantity of land on each side of the road, the amount being designated at so many sections per mile, with a privilege to receive a patent for land opposite that portion constructed as often as each section of 20 miles was completed. If this privilege were not claimed, the land could be selected along the whole line of the road without reference to any particular section of 20 miles. When lateral limits are assigned to a grant, the land within them must, of course, be exhausted before land for any deficiency can be taken elsewhere; and when no lateral limits are assigned the Land Department of the Government, in supervising the execution of the act of Congress, should undoubtedly, as a general rule, require the land to be taken opposite to each section, but in some instances good reasons may exist why a selection elsewhere ought to be permitted. If, as in the present case, by its neglect for years to withdraw from sale land beyond 20 miles from the road, the land opposite to any section of the road has been taken up by others, and patented to them, there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road.

This sustains me in the construction I place upon these grants, that only two things are necessary in determining the rightfulness of the appropriation of timber: First, that it be taken from public lands adjacent to the line of road; and, second, that it be used in the construction of the road. This disposes of substantially all the questions in the case. One or two minor matters remain for notice.

As appears from the agreed statement of facts, a part of the road was completed before June 8, 1882, the time limited by the special act and its amendment, and a portion has been constructed since. For convenience I shall call the first part the old line and the latter part the new line. Now, the special right given by the special act—that is, the right to take timber for repairs—is by the proviso specifically limited to the old line, so that no timber can be taken from lands adjacent to it for repairs on the new line, and, conversely, none from land adjacent to the new line for repairs on the old. Again, for the rights granted under the general act both the old and the new lines are to be taken as parts of one road, so that timber can be taken from any part of the entire line for the construction of any part of the road provided for in the original organization. Again, I think there can be no doubt that section and depot houses, snowsheds, and fences are properly to be considered, in the purview of the act, a part of the railroad.

I have not hitherto noticed the agreed statement of facts in the second case, for the matters that I have been considering disposed of every question in that case except that which arises upon the eighth paragraph, which is "that one-fourth of said timber has been used in the construction of new switches and side tracks along the line of road completed subsequent to June 8, 1882," and that presents the question whether this timber was used in the construction of the railway. On

the one side it is claimed that this refers to repairs, new switches, etc., being in lieu of old switches, etc. On the other hand, it is claimed that this means absolutely new switches, etc.; that is, switches, etc., where there were none before. I think it immaterial which is the meaning. Of course if repairs, it was unlawful, because upon the new line; and if, on the other hand, absolutely new switches and side tracks, they were upon a line of road already completed, so that they were merely additions, extensions, and improvements. The grant does not extend to these matters, but is exhausted when the line is once completed. Of course we all know that the developments of the country and increase of business will require constant additions—new depots, section houses, switches, and side tracks. The demand for these will never be exhausted, but will continue as long as the surrounding country increases in population and business. Now, the grant was not intended to aid in supplying these successive demands. It was to aid in the first construction, and when that was completed the grant was exhausted. So, in either event, this appropriation of timber was unlawful.

Of course the supply of timber for other roads was not within the contemplation of the act.

This disposes of all questions in the case. From the views above expressed, it follows that the judgment of the district court in each case must be modified. In the first case judgment will be entered in favor of the Government for the amount of timber shipped to the Utah lines and for the $1,000 worth of timber cut on land adjacent to the new lines for repairs on the old, and in the second place judgment will be for the one-fourth which was used in the construction of new switches and side tracks.

UNITED STATES *v.* DENVER AND RIO GRANDE RAILWAY COMPANY.

Error to the circuit court of the United States for the district of Colorado (150 U. S., 1).

After the expiration of the time limited by the act of June 8, 1872 (17 Stat., 339, ch. 354), for the completion of its road to Santa Fe, if not before that time, the Denver and Rio Grande Railway Company was entitled to claim the benefit of the act of March 3, 1875 (18 Stat., 482, ch. 151), upon complying with its conditions.

The act of March 3, 1875 (18 Stat., 482, ch. 151), granting a right of way to railroads through the public lands, and authorizing them to take therefrom timber or other materials necessary for the construction of their roadways, station buildings, depots, machine shops, side tracks, turn-outs, water stations, etc., permits a railway company to use the timber or material so taken on portions of its line remote from the place from which it is taken.

In its ordinary acceptation and enlarged sense, the term "railroad" includes all structures which are necessary and essential to its operation.

While it is well settled that public grants are to be construed strictly as against the grantees, they are not to be so construed as to defeat the intent of the legislature or to withhold what is given.

General legislation, offering advantages in the public lands to individuals or corporations as an inducement to the accomplishment of enterprises of a quasi public character through undeveloped public domain should receive a more liberal construction than is given to an ordinary private grant.

It is not decided that the act of March 3, 1875, gave a right to take timber from the public domain for making rolling stock; nor what structure, if any, not enumerated in that act, would constitute necessary, essential, or constituent parts of a railroad.

SEATTLE, WASH., *October 12, 1893.*

SIR: I have the honor to acknowledge the receipt of your letter of October 5 * * * concerning my request of July 18, 1893, for reinvestigation of timber trespass case against Chatteroy Lumber Company.

* * * * * * *

On the trial it was proved that the timber was all cut from lands within 2 miles of the line of the road. The court instructed the jury that the word "adjacent" used in the act, under the evidence in that case, meant anywhere within 5 miles of the line of the road.

* * * * * * *

I am, very respectfully, your obedient servant,

WM. H. BRINKER,
United States Attorney.

COMMISSIONER OF THE GENERAL LAND OFFICE,
Washington, D. C.

UNITED STATES *v.* PRICE TRADING CO. ET AL.

Circuit court of appeals, eighth circuit (109 Fed. Rep., 239).

1. PUBLIC LANDS—CUTTING OF TIMBER BY RAILROAD COMPANY—CONSTRUCTION OF STATUTE.

Under act March 3, 1875 (18 Stat., 482), granting to railroads a right of way through the public lands of the United States, a railroad company constructing its line in conformity with its provisions, and which is thereby given the right to take timber from public lands adjacent, to be used in the construction of its road, is authorized to take timber from lands adjacent to any part of its completed main line for use in the original construction of a branch line which it is authorized by its charter to build, although such branch is not constructed for several years after the main line.

* * * * * * *

UNITED STATES *v.* ECCLES ET AL.

Circuit court, district of Utah (111 Fed. Rep., 490).

1. PUBLIC LANDS—RIGHT OF RAILROAD COMPANY TO CUT TIMBER—CONSTRUCTION OF STATUTE.

Act March 3, 1875 (18 Stat., 482), granting right of way for railroads over the public lands, which confers on a company so constructing its road, "which shall

have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same," the right to take timber and other materials for the construction of its road from public lands adjacent to its line, confers no right to cut timber for such purpose prior to the filing of the required papers, nor does the subsequent use in the construction of the road of timber so cut render the cutting lawful or divest the title of the United States thereto, since the act does not give the right to appropriate timber already cut.

2. Same—Action for Unlawful Cutting of Timber—Defenses.

Where defendants, in an action by the United States to recover the value of timber cut from public lands, defend on the ground that the timber was taken for use in the construction of a railroad, as authorized by act March 3, 1875, the burden rests on them to bring themselves within the provisions of such act; and when it appears that at least a part of the timber was cut before the railroad company had filed its articles and proof of organization with the Secretary of the Interior, so as to be entitled to take timber for its use, it is incumbent on the defendants to show what part, if any, was cut after that time.

United States *v.* St. Anthony R. Co.

Circuit court of appeals, ninth circuit (114 Fed. Rep., 722).

1. Public Lands—Cutting Timber—Right of Railroad.

Under act March 3, 1875, section 1, granting railroad companies the right of way through public lands, with right to take from public land "adjacent" to the line of railroad timber necessary for the construction of the road, timber cut at a distance from the road of 17 to 23 miles by air line, 20 to 25 miles by wagon road, and 22 to 26 miles by the windings of a river down which some of it was floated, was taken from "adjacent" land within the meaning of the act, it appearing that it was a barren, frontier country, with no suitable timber nearer than that taken, and that the lands from which it was taken were materially benefited by the road, and the timber could be hauled that distance with reasonable profit.

2. Statute—Construction.

In act March 3, 1875, section 1, the meaning of the word "adjacent" as applied to public lands should be determined by the evidence in each particular case.

RAILROAD RIGHT OF WAY—ACT OF MARCH 3, 1875.

Kootenai Valley R. R. Co.

(28 L. D., 439.)

As between the United States and a railroad company claiming the benefit of the act of March 3, 1875, the company is entitled to take from the public lands adjacent to the line of its proposed road timber and material necessary for the construction thereof, on the filing of its articles of incorporation and due proofs of organization, as provided in section 1 of said act.

The articles of incorporation and proofs of organization are required by said act to be filed with the Secretary of the Interior, and where the same are found sufficient to identify the company as a beneficiary of the grant and are accepted by the Secretary, the right acquired by said acceptance will relate back to the time when said articles and proofs were presented, so as to protect the company in any subsequent use of timber and material necessary for the construction of the road.

If timber necessary for the construction of the road can not be found laterally adjacent to and within the termini of the proposed road, it is permissible to go beyond said termini to secure such material.

In determining whether the timber is taken from lands adjacent to the line of the proposed road, the nature of the country to be traversed by said road and the most available means of transportation may be considered.

Secretary Hitchcock to the Commissioner of the General Land Office, May 31, 1899.

With your office letter of May 24, 1899, was submitted, with request for instructions, five separate reports made by a special agent, in accordance with directions given by your office, regarding the cutting and removal of timber from surveyed and unsurveyed public lands in the State of Idaho, in March and April last, by contractors, for use in the construction of the Kootenai Valley Railroad. The amount of the cutting involved in the several reports aggregate 735,000 feet of timber and 31,025 railroad ties.

Articles of incorporation and proofs of the organization of said Kootenai Valley Railroad Company were submitted to this Department by your office November 5, 1898. They were returned to your office for correction and were again transmitted to the Department March 24, 1899, and were accepted as sufficient March 29, 1899.

According to the articles of incorporation this company was organized for the purpose of building a railroad in the State of Idaho from Bonners Ferry, on the line of the Great Northern Railway, in a northerly direction to the international boundary. A map showing the line of location of the proposed road was filed in the local land office at Coeur d'Alene, Idaho, on November 23, 1898. No action appears to have been taken upon said map by your office, looking to the approval of the same, under the fourth section of the act of March 3, 1875. (18 Stat., 482.)

In your office letter it is stated that the material, cut as aforesaid—

has virtually been taken possession of by the Government, on the ground that it was unlawfully procured from public lands, and the railroad company have been thereby delayed and obstructed in the building of the road, which will develop and open up to settlement an important section of the country—

but the Department is verbally informed by Mr. Thomas R. Benton, the attorney for the company, that it is his understanding that all timber and ties referred to in said reports are in possession of the company, except 7,000 ties which are the subject of the agent's report of May 12, 1899, the same having been cut from and being now upon what will be, when survey is accepted, sec. 2, T. 62 N., R. 2 E.

Your office letter submitting said reports states that the main questions suggested by the reports are as follows:

First. Had the company the right, under the act of March 3, 1875 (18 Stat., 482), to procure timber from public lands for construction purposes prior to the approval or acceptance of a copy of its articles of incorporation, etc., required by the act to be filed with the Secretary of the Interior?

Second. If the company had such a right, were the timber and ties specified in Special Agent Thorp's reports cut by or for said company for actual construction purposes?

Third. Were such timber and ties procured from public lands adjacent to the line of the road?

Relative to the first question, you state:

I am of the opinion that the position heretofore taken by this office, that a right-of-way railroad, duly incorporated and organized as prescribed in the act of March 3, 1875, has no right to begin construction or to exercise the privileges granted by section 1 of said act until a copy of its articles of incorporation and evidence of its organization thereunder has been accepted or approved by the Secretary of the Interior, is erroneous and not authorized or contemplated by said act.

* * * * * * *

There is no provision in the law which specifically requires the approval of the copies of articles of incorporation by this Department, but, even if such a requirement can be implied, the approval of the papers would relate back to date of filing, and in the case in question none of the timber or ties was cut until some four months after the filing of said papers by the railroad company.

* * * * * * *

In view, however, of the former practice or holdings of this office, that the rights of a right-of-way railroad to begin the construction thereof does not attach until after the copy of its articles of incorporation and evidence of its organization thereunder have been approved by the Department, I feel constrained to refer the entire matter to the Department for its consideration and for advisory instructions.

The question here raised relates to the time when a railroad company seeking to secure the benefits of the act of March 3, 1875, becomes entitled thereto. This question does not appear to have ever been made the subject of consideration by this Department with respect to the right of the company to take material, etc., from the public lands adjacent to the line of road for the purpose of construction. In the case of Dakota Central R. R. Co. *v.* Downey (8 L. D., 115), it was held that the right of way conferred by the act of March 3, 1875, does not attach by the filing and acceptance of the company's articles of incorporation and proofs of organization, but when the line of road is definitely fixed, either by actual construction or the filing of the map of location, as provided for in the fourth section of the act. The question involved in that case was as to whether a reservation should be made in the patent issued on account of an entry made of lands crossed by the claimed right of way.

The act of 1875 grants a right of way across the public lands 100 feet in width on each side of the central line of the road, and also the right to take from the public lands adjacent to the line of the road, material, earth, stone, and timber necessary for the construction of the railroad. So far as these grants may interfere with the rights of others claiming the land as settlers or by reason of entry thereof, it is clear that, in addition to the filing of the articles of incorporation and due proofs of the organization, the railroad company must also give fixedness to the line of its proposed road, on account of which a right is claimed, before the initiation of the adverse claim, in order to

subject such land to the grant; but this can be done either by the filing of maps as provided for in the fourth section of the act, by reason of which the company would gain a right in advance of the actual construction of its road, or by the building of its road. Where, as in the matter under consideration, the question is one solely between the United States and the company claiming the benefits of the provisions of the act, all that is necessary in order to entitle the company to the right to take from the public lands adjacent to the line of its proposed road material, earth, stone, and timber necessary for the construction thereof is the filing of its articles of incorporation and due proofs of organization, as provided for in the first section of the act; for if the full privileges of the grant made by the act can be secured by the construction of the road without the previous filing of the map of location, as recognized in the case of Washington and Idaho R. R. *v.* Coeur d'Alene Ry. (160 U. S., 77, 97) and the case of Dakota Central R. R. *v.* Downey (*supra*), the right to take stone and timber must exist before construction, for the use to be made of the material, earth, stone, and timber is limited to the construction of the road.

In the case of United States *v.* Denver, etc., Ry. (150 U. S., 1, 14) it was said:

> When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. (Bradley *v.* New York and New Haven Railroad, 21 Conn., 294; Pierce on Railroads, 491.)

The articles of incorporation and due proofs of organization are required by the act to be filed with the Secretary of the Interior, and where the same are found sufficient to identify the company as a beneficiary of the grant and are accepted by the Secretary of the Interior, the right acquired by the acceptance will relate back to the time of the presentation of the articles of incorporation and proofs of organization, so as to protect the company in any subsequent taking of material, earth, stone, and timber necessary for the construction of the road.

The second question, namely, "Were the timber and ties specified in Special Agent Thorp's report cut by or for said company for actual construction purposes?" seems to be sufficiently answered in that portion of your said office letter which states that—

> The second question is answered in full by Special Agent Thorp's reports and the affidavits submitted therewith, which seem to conclusively establish the fact that the timber and ties specified were procured from public lands solely for the construction of the Kootenai Valley Railroad.

In respect to the third question, namely, "Were such timber and ties procured from public lands adjacent to the line of the road?" your said office letter states that—

The question as to what are "public lands adjacent to the line of said road," which is involved in the third query, has been construed in many conflicting ways by the courts and by decisions of this office and the Department, and no definite conclusion can be arrived at which will apply, in general, to every case. In my opinion, it should apply, in general, to the nearest and most available public lands, within a reasonable distance from the line of the road, from which the necessary timber can be procured, and it should especially apply to such lands as are within such proximity to the road as to be directly benefited by the building of the road, by being opened up to settlement and development, to a degree equivalent to the value of the timber or other material procured therefrom. Where the lands, however, are, while only from 4 to 5 miles from the line of a road, in a direct line, but are separated from the road by mountains which it would be impossible to get the timber across, and the only way the timber cut from said lands can reach the line of road is by a long and circuitous route of some 10 or 12 miles, I am of the opinion that such lands can not be considered as "adjacent to the line of the road" within the meaning of the act of March 3, 1875.

With this view of the matter it seems to me that in the case of Hopkins and Reed reported by Agent Thorp May 11, 1898, involving 500,000 feet of timber cut from what will be, when survey is accepted, secs. 20, 22, and 28, Tp. 62 N., R. 2 E.; in the case of Parker Brothers, reported by Agent Thorp May 12, 1899, involving 7,000 ties cut from what will be, when survey is accepted, sec. 2, Tp. 62 N., R. 2 E., and in the case of Jerry Callahan, reported by Agent Thorp May 12, 1899, involving 235,000 feet of timber cut from what will be, when surveyed, sec. 18, Tp. 60 N., R. 1 E., the lands cut from being over 5 miles distant from the line of the road in a direct line, or it being impossible to deliver the timber cut therefrom to the railroad without transporting it by a long and circuitous route of from 7 to 12 miles, said lands can not be considered within the proximity of the line of the road or within such reasonable distance therefrom as to be considered lands "adjacent" to the line of the road, and I am of opinion that demand should be made upon the railroad company and its contractors for the stumpage value of said material, as innocent trespassers, before said timber and ties are delivered to them.

With regard to the 24,025 railroad ties specified in the remaining two reports of Special Agent Thorp, both dated May 13, 1899, as cut from S. ½ NE. ¼ sec. 8, Tp. 62 N., R. 1 E.; sec. 6, Tp. 63 N., R. 1 E., and on what will be, when surveyed, secs. 7, 20, 29, and 32, Tp. 64 N., R. 1 E., in which said agent reports that the lands are within 1 mile of the line of the road, and the ties have been hauled to and are now piled on the right of way, there appears to be no question but what said lands are adjacent to the line of the road and [the ties] should be released to said road.

It appears that the 235,000 feet of timber referred to in the agent's report of May 12 were cut from lands about 10 miles due south of the southern terminus of the road, and that the 500,000 feet of timber referred to in the agent's report of May 11 were cut from lands almost directly east from the southern terminus of the proposed road and from 5 to 7 miles distant therefrom.

In circular of March 3, 1883 (1 L. D., 699), issued under the act of March 3, 1875 (supra), it is stated, in paragraph numbered 2, that—

The right granted to any railroad company under this act to take timber or other material from the public lands "adjacent to the line of said road" for construction

purposes is construed to mean that in procuring timber or other material for the purposes indicated in the act the same must be obtained from the public lands in the neighborhood of the line of road being constructed and within the terminal points of such roads, if possible. If, however, it should be found that the material required in the construction of such road can not be procured from the public lands in the neighborhood of and within the terminal limits of such road, then it is permitted that such company may obtain the material required outside the terminal limits of the road under construction; such material, however, to be taken from such points as are most accessible and nearest to the terminal limits thereof.

Under this construction of the act it would be possible to go beyond the termini of the road in securing timber for construction if it could not be found laterally adjacent to and within the termini of the proposed road.

It does not appear, however, that any inquiry has been instituted by your office with a view of ascertaining whether necessity existed for the cutting of timber beyond the terminus at Bonners Ferry.

As to the timber and ties cut from lands laterally adjacent to the line of road, it is stated in your said office letter that a portion, especially the 7,000 ties cut from what will be, when surveyed, sec. 2, Tp. 62 N., R. 2 E., and the timber cut to the east of the road at its terminus at Bonners Ferry, were cut from lands "separated from the road by mountains which it would be impossible to get the timber across, and the only way the timber cut from said lands can reach the line of road is by a long and circuitous route of some 10 or 12 miles." Your office is of opinion that these lands are not "adjacent to the line of the road" within the meaning of the act of March 3, 1875.

It is not stated that there is any nearer available timber that might be used by the company; and when the nature of the country to be traversed by the proposed road is considered, together with the evident purpose to use the streams as a means to carry the timber to the road, thus saving hauling, it is the opinion of this Department that these lands are adjacent to the line of road, notwithstanding they may be "separated from the road by mountains."

The reports, together with accompanying papers, are herewith returned for your further consideration and action in the light of the construction herein given to the act.

RAILROAD RIGHT OF WAY—GRAVEL BED—CONSTRUCTION.

GREAT NORTHERN RWY. CO.

(14 L. D., 566.)

Assistant Attorney-General Shields to the Secretary of the Interior, May 13, 1892.

The use of material under the general right-of-way act of March 3, 1875 (18 Stat., 482), and the special act of February 15, 1887 (24 Stat., 402), is limited to construction, and does not include the repair or

improvement of a railroad. The period of original construction ceases when the road is open to the public for general use.

(This opinion was adopted by the Secretary of the Interior May 17, 1892.)

RAILROAD COMPANIES CAN NOT PROCURE TIMBER FROM PUBLIC MINERAL LANDS UNDER THE ACT OF JUNE 3, 1878 (20 STAT., 88).

The act of June 3, 1878 (20 Stat., 88), authorizing the cutting of timber for building, agricultural, mining, and other domestic purposes, from public lands which are known to be mineral and not subject to entry under existing laws of the United States except for mineral entry, expressly provides that "the provisions of this act shall not extend to railroad corporations."

Railroad companies can not, accordingly, take timber from public mineral lands for any of the purposes enumerated in said act.

This prohibition does not, however, operate to interfere, in any wise, with their taking timber from such lands for the purposes allowed in the act of March 3, 1875 (18 Stat., 482), and the several land-grant acts authorizing railroad companies to take public timber for construction purposes.

UNITED STATES *v.* EUREKA AND P. R. CO.

Circuit court, district of Nevada (40 Fed. Rep., 419).

PUBLIC LANDS—TIMBER—CUT FOR USE BY RAILROAD COMPANY.

The defendant, a railroad corporation, purchased for use upon its locomotives and cars wood severed from the public mineral lands. *Held*, that such purchase and use were unlawful, and that the United States could recover from defendant the value of the wood so severed and purchased by it.

THE UNITED STATES *v.* O. A. DODGE ET AL.

District court, first judicial district, Nez Perces County, Idaho Territory.

GENTLEMEN OF THE JURY: The defendants are charged with willfully and unlawfully cutting and removing certain timber from the lands of the United States.

I instruct you that the timber growing upon the lands of the United States is a part of the land and the property of the United States, and no person has the right to cut such timber and appropriate the same to his own use without some express provision of law authorizing him to do so.

Some evidence has been introduced tending to show that certain preemption claims had been located upon the land from which the timber is alleged to have been cut.

I instruct you as a matter of law that a preemptor has no right to cut and remove the timber from his claim except for the purpose of

preparing the same for cultivation, and no one has the right to purchase timber removed from a preemption claim which the preemptor cut for purposes other than the preparation of the claim for cultivation and for the residence of the preemptor. If a person do so he is a trespasser, and if he do so, knowing that it has been cut off from the land for the purpose of sale merely and not the genuine purpose of improving the claim, his trespass is willful.

To explain more fully, if a preemptor having a claim covered with timber desire to build a house or a fence, he may cut timber from any part of such claim suitable for such purposes. So if he desire to plow and seed 20 acres, he may cut and remove all the timber on said 20 acres and may sell the wood or logs cut therefrom; so he may do from the whole claim if he wishes to cultivate the whole; but he is not at liberty to cut and remove timber from any part of said land simply as a matter of converting the same into money before he has paid for it and not in good faith for the purpose of improving his claim and preparing it for cultivation. If he do so, the preemptor so cutting the timber is a trespasser; and if others buy it of him, knowing the facts, they also are trespassers and liable for the value of the timber.

I further instruct you that in case of such a trespass the fact that the United States afterwards patented said land to other persons does not relieve those committing the trespass from their liability for their wrongful acts in cutting the timber.

It is the policy of the Government to preserve the timber growing upon such of the public lands as are fit for cultivation for the use of those who shall settle upon and purchase it.

There are, however, some portions of the public domain which are more valuable for the mineral that is in the soil than for agricultural purposes. Such lands are called mineral lands, and the Government does not sell them except in small quantities for mining purposes.

From this mineral land any person may cut and remove the timber for domestic purposes.

The defendants claim that the timber in question was cut from mineral lands for domestic and other lawful purposes. I instruct you that in actions of this kind, when a person is proven to have cut timber from the public domain, the law holds him liable for the value of such timber unless he shows in defense that he cut the same under such circumstances as authorized him to do so under the laws of the United States.

In this case the defendants claim that the land is mineral land. By mineral lands is meant such land as is more valuable for mining than for agricultural purposes, and the burden of proving its mineral character devolves upon the defendants; so also is the burden on the defendants of proving that they cut the same for domestic or other lawful purpose. It is also claimed by defendants that the timber cut was for the use of the Northern Pacific Railroad and used in the construction of said

road. I instruct you that the Northern Pacific Railroad during the period of its construction had the right to so much of the timber upon the public lands adjacent to it as was needed to construct it.

If the defendants took a contract from said railroad to furnish a certain bill of lumber, and in pursuance to said contract they cut the timber in question, they would be justifiable in doing so. If, however, they had a sawmill and lumber yard, and sold lumber to the railroad company as they did to the general public, without said lumber having been specially procured for their use, such purchase would not excuse defendants from their liability for lumber cut on the public domain.

If the railroad company notified defendants, either verbally or in writing, that they desired lumber of a certain description for their road and they procured such lumber for them, such an order from the company filled by defendants would justify them cutting the same from the public domain, but it would not excuse their going beyond the orders and stocking a lumber yard for commercial purposes generally from timber cut from the public domain.

In considering whether this timber was cut for the railroad company the question of whether the land is mineral or nonmineral is not important, as under the charter of the road they might cut from either.

The first question, then, is: Did defendants cut or cause others to cut or purchase the timber of others who unlawfully cut it?

Second. Was the land from which the timber was cut mineral lands?

Third. If the defendants cut the timber, or purchased it from others having cut it, was it cut for the Northern Pacific Railroad or for domestic purposes?

If you find that the defendants cut or purchased the timber, and they themselves testify that they did purchase a certain amount, and that they did so for the railroad company, under the instructions that I have given you you ought to find for the defendants.

If you find from the evidence that the defendants cut or purchased the timber from those who cut it, and that said cutting was wrongful, you ought to find for the plaintiff and determine the amount cut and the value of it.

In determining the value, if you find that defendants acted in good faith, without intending to defraud the Government, but supposing they had a right to buy it, you should find the value of it to be the same as it was immediately before it came into their possession.

If you find that the defendants bought the logs of another who wrongfully cut them, knowing that they were wrongfully cut, you should find the damage to be the value of the logs after they were converted into lumber.

TIMBER ON LANDS WITHIN LIMITS OF THE GRANT TO THE NORTHERN PACIFIC RAILROAD COMPANY.

United States *v.* William Childers.

District court, district of Oregon (8 Sawyer, 171).

Grant to the Northern Pacific Railway Company.

By the act of July 2, 1864 (13 Stat., 365), the odd-numbered sections along the line of the Northern Pacific Railway Company for 40 miles on either side of the line in the Territories, and 20 miles in the States, are set apart and devoted to the construction of the road of said corporation; but said act is not a present grant of said lands to said corporation, but only in effect an agreement or provision that the same shall be conveyed to it absolutely, when and as fast as any 25 miles of said road is constructed and accepted by the United States; and in the meantime the legal title to the unearned and unpatented sections is in the United States, who may therefore maintain legal proceedings against anyone that unlawfully cuts timber thereon.

Northern Pacific R. Co. *v.* Hussey.

Circuit court of appeals, ninth circuit (61 Fed. Rep., 231).

Railroad Land Grants—Unsurveyed Lands—Tenants in Common.

A land-grant railroad company is not a tenant in common with the United States in respect to lands which lie within its grant limits, opposite the completed line, but which have not yet been surveyed, so as to render the odd sections belonging to the company distinguishable from the even sections reserved to the Government.

Same—Enjoining Trespassers.

The company has, however, such an interest in the lands as will entitle it to maintain alone (the Government having refused to join with it) a suit to enjoin trespassers who are cutting timber from the lands in such manner that the denuded portions will fall within the odd as well as the even sections when the survey is made.

United States *v.* Ordway and others.

Circuit court, district of Oregon (30 Fed. Rep., 30).

Public Lands—Cutting Timber—Action for Damages—Partial Defense.

A partial defense to an action or in mitigation of the damages claimed therein ought to be pleaded in the answer as a distinct defense; and an allegation that the defendants cut and removed certain timber from alleged public land, believing that it was the land of the Northern Pacific Railroad Company, from which they had a license, is such a defense, where the damages claimed in the complaint are based, not only on the value of the timber in the standing tree, but also the value bestowed on the same in converting it into lumber and putting it into market.

Same—Grant to the Northern Pacific Railroad Company.

The grant of certain odd sections of the public lands to the Northern Pacific Railway Company, by the act of July 2, 1864 (13 Stat., 365), does not give the corporation any such present right to, or interest in, any one of such sections as authorizes it to waste the same by disposing of the timber thereon before it is

earned by the construction of the section of the road adjacent and opposite thereto. (The case of the U. S. *v.* Childers, 8 Sawy., 171, 12 Fed. Rep., 586, distinguished from Buttz *v.* Northern Pac. Ry. Co., 7 Sup. Ct. Rep., 100, and followed.)

PUBLIC LANDS—EARNED LANDS.

On the construction and acceptance of any section of the road of the Northern Pacific Railway Company, the coterminous odd sections vest absolutely in the corporation, and thereafter the patent therefor may be considered as having issued.

UNITED STATES *v.* ORDWAY AND OTHERS.

Circuit court, district of Oregon (30 Fed. Rep., 36).

DEADY, *J.:*

This case was argued and submitted with the foregoing one. It is alleged in the complaint that on May 1, 1883, and divers days since, the defendants cut and removed from the public lands of the United States, to wit, the west ½ of section 13 of township 3 north, of range 9 east, of the Willamette meridian, situate in Washington Territory, 600 trees, and cut the same into cord wood, to wit, 3,000 cords, of the value of $7,500, and wrongfully converted the same to their own use, to the damage of the plaintiff, $7,500. The defenses are similar to those made in the foregoing case, to wit: Denials; a license from the Northern Pacific Railway Company; and the cutting was done in good faith. In the second defense it is alleged that the premises are within the limits of the grant to the Northern Pacific on the line of its general route between Portland and Wallula Junction, and that acting under a license from said corporation they cut and removed from said half section not more than 1,800 cords of wood, of no greater value when standing in the tree than 10 cents a cord.

The demurrer to the defenses of good faith is overruled, and sustained to that of license from the Northern Pacific.

RIGHT OF THE UNITED STATES TO RECOVER FOR TRESPASS COMMITTED ON UNSURVEYED LANDS WITHIN THE LIMITS OF THE NORTHERN PACIFIC RAILROAD GRANT.

DEPARTMENT OF JUSTICE,
Washington, D. C., January 30, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant, inclosing a copy of a communication dated April 29, 1896, addressed to the Commissioner of the General Land Office by Messrs. Britton & Gray, of this city, attorneys for the Northern Pacific Railway Company, relating to "extensive timber trespassing upon unsurveyed lands in the States of Montana, Idaho, and Washington, lying within the limits of the Northern Pacific Railroad grant." Messrs. Britton & Gray state that the "timber thieves have been particularly active upon this class of lands, feeling assured that the United

States Government and the railroad company would never join in an action against them," and suggest that these cases be prosecuted jointly by the United States and the railroad company, the proceeds to be equitably distributed, or that suits be brought by the district attorney, in behalf of the United States and Mr. F. M. Dudley, or other attorney of the railroad company, in its behalf, under the agreement that the expenses and recoveries of suits might be shared in equal proportion by the Government and the railroad company.

In your letter above referred to, after citing decisions bearing upon the questions involved, you express the opinion that the United States is authorized, by reason of its legal relation to the lands, to sue alone and stand in judgment upon the issues presented by the company, and state that "if the view of law herein presented is not concurred in it is recommended, in the alternative, that suits be prosecuted jointly with the company, as requested by its counsel."

By the act of July 2, 1864 (13 Stats., 365), granting alternate sections of lands to the Northern Pacific Railroad Company to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, it is provided that Congress may at any time, having due regard for the rights of the Northern Pacific Railroad Company, add to, alter, amend, or repeal that act.

And in 1870 (16 Stats., 305), Congress provided that before any land granted to the Northern Pacific Railroad Company should be conveyed to any person entitled thereto under any act incorporating or relating to said company, the cost of surveying, selecting, and conveying the same should first be paid into the Treasury of the United States.

The land lying in Montana, Idaho, and Washington, claimed by the railroad company, has never been surveyed by the Government, but the records of the General Land Office show, as stated by the Commissioner, that the railroad company, upon their own private survey of the lands, have scaled the timber cut from what they designate as odd numbered sections and have received payment therefor at the rate of $1 per thousand feet.

In Railway Co. *v.* Prescott (16 Wall., 603) and Railway Co. *v.* McShane (22 Wall., 444), decided in 1872 and 1874, respectively, the Supreme Court held that taxes levied on lands granted by Congress to aid in building the roads (Kansas Pacific and Union Pacific) were void by reason of the fact that neither the companies nor anyone for them had paid to the United States the costs of surveying those lands by the Government.

In Northern Pacific Railroad Co. *v.* Traill County (115 U. S., 609), decided in December, 1885, the Supreme Court held that the clause authorizing Congress to add to, alter, or amend or repeal the act of 1864 clearly conferred this power on Congress, especially when exercised, as in this instance, before the company had built a mile of road

or earned an acre of land, or in any other manner secured an equitable right to the lands.

In Railway Co. *v.* Prescott the court added:

> Two important acts remained to be done, the failure to do which might wholly defeat the company's title. One of these was payment of the costs of surveying.

I am therefore inclined to think that the United States has such title to the lands mentioned as will enable it to sustain an action for timber trespass.

I have advised the United States attorneys for Montana, Idaho, and Washington of the conclusion reached and, as suggested in your letter, have directed them to take such action on behalf of the Government as will result in the recovery of the timber capable of being identified as having been removed from lands embraced within the lateral limits of the grants within those States, and of damages where that remedy is appropriate.

Very respectfully, JUDSON HARMON,
Attorney-General.

The SECRETARY OF THE INTERIOR.

RIGHT OF UNITED STATES TO RECOVER FOR TIMBER CUT FROM LANDS GRANTED TO A STATE FOR RAILROAD PURPOSES, WHICH SUBSEQUENTLY REVERTED TO THE GOVERNMENT FOR FAILURE OF CONDITIONS.

UNITED STATES *v.* LOUGHREY.

Error to the circuit court of appeals for the seventh circuit (172 U. S., 206).

Under the act of June 3, 1856 (chap. 44, 11 Stat., 21), the State of Michigan took the fee of the lands thereby granted, to be thereafter identified, subject to a condition subsequent that if the railroad to aid in whose construction they were granted should not be completed within ten years the lands unsold should revert to the United States, but until proceedings were taken by Congress to effect such reversion the legal title to the lands and the ownership of the timber growing upon them remained in the State, and the United States could not maintain an action of trespass against a person unlawfully entering thereon and cutting and removing timber from the land so granted; and timber so cut and separated from the soil was not the property of the United States, and did not become such after acquisition of the lands by reversion; and the United States could not avail themselves of the rule that in an action of trover a mere trespasser can not defeat the plaintiff's right to possession by showing a superior title in a third person, without showing himself in a privity with, or connecting himself with, such third person.

RAILROADS CONSTRUCTED FOR PRIVATE USE NOT ENTITLED TO USE PUBLIC TIMBER.

In constructing a railroad not for use and benefit of the general public, but for private use, the entering upon public lands and destroying timber thereon in the clearing of a right of way, and in digging, grad-

ing, and excavating for a roadbed, the defendants held to be guilty of trespass, and the United States clearly entitled to recover damages from them. * * *

The judge in his charge to the jury affirming "that it was agreed by both great parties that the public lands and the timber thereon must be protected for the future as well as the present generation." (See Land Office Report for 1889, p. 291; case of U. S. *v.* O. S. Burdett and A. Rosenfield, eastern district of Louisiana, Judge E. C. Billings, May term, 1889.)

USE OF PUBLIC TIMBER BY TELEGRAPH COMPANIES.

(Act of July 24, 1866; 14 Stat., 221; Sec. 5264, Rev. S.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may preempt and use such portions of the unoccupied public lands subject to preemption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

* * * * * * *

SEC. 4. *And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this act.

The act of July 24, 1866, authorizing the construction and maintenance of telegraph lines through and over the public domain, and along military or post roads of the United States, contains no grant or authority for the construction and maintenance of telephone lines. (Opinion of Assistant Attorney-General for the Interior Department, July 1, 1899, 29 L. D., 1.)

Commissioner Hermann to the Secretary of the Interior, January 27, 1900.

I have the honor to acknowledge receipt, by reference from the Department "for consideration, appropriate action, and report," etc., of a communication dated January 3, 1900, from Mr. John Musselman, manager of the Black Hills Telegraph and Telephone Company, requesting that the company be allowed to cut and clear the brush and growth of young timber from the right of way of its telephone lines within the Black Hills Forest Reservation.

The petitioner states that these telephone lines have been in constant operation for the past ten to fourteen years, and that the brush and undergrowth interfere with their use for communication.

I have respectfully to state that under departmental decision of July 1, 1899 (29 L. D., 1–7), based upon the decision of the Supreme Court in the case of the The City of Richmond *v.* The Southern Bell Telephone and Telegraph Company (174 U. S.), telephone companies have no statutory right to construct their lines over the public lands, except in so far as they may build under a right-of-way grant to a railway company where the statute authorizes the construction and maintenance of a telephone line upon said right of way.

PROCURING WOOD FROM PUBLIC LANDS FOR USE OF MILITARY POSTS.

Department of the Interior,
Washington, August 9, 1886.

Sir: I have the honor to acknowledge the receipt of your letter of the 5th instant transmitting a copy of a letter, dated the 1st ultimo, from Joel R. Slack, who made a contract with the Government for delivering at Whipple Barracks, Ariz., 1,000 cords of wood, under the supposition he would be allowed to cut the wood from the public lands; a copy of notice to Slack from T. M. Bowers, special agent of the General Land Office, to desist from cutting wood on the public domain and requesting, in accordance with the recommendation of the Quartermaster-General, that "authority be given to cut wood on vacant lands of the public domain for the use of the Army," and stating, in passing, the remark of the chief quartermaster of the Department of Arizona, "that unless the wood required to supply the army on the frontier can be cut by contractors on vacant public lands belonging to the United States it will be an expensive item in that department to the Army."

There is no objection to allowing wood to be taken from the public domain for the use of the Army under proper regulations when circumstances render it necessary. The decision by the Court of Claims in the case of Nannie Spencer, administratrix of Warren Faver, grants

this, and says that "the proper officers might lawfully employ individuals to cut wood from the public land for the use of the military force so situated;" but the decision adds, "in such case the persons so employed would be paid not for the wood, *but for cutting and hauling it.*"

As requested in your communication, permission is granted to cut wood on the public domain convenient to Whipple Barracks for the use of said post in accordance with the decision of the Court of Claims herein referred to; but the persons furnishing the wood should be paid for its cutting and delivery alone, and not for the value of the timber, as that belongs to the United States.

Very respectfully, L. Q. C. Lamar,
Secretary.

The Secretary of War.

FOREST RESERVATIONS.

(Act of Mar. 3, 1891; 26 Stat., 1095.)

* * * * * * *

Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land, bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

The laws, regulations, and decisions relating to timber upon lands within public forest reserves are contained in a compilation issued by the General Land Office on November 6, 1900.

EXTENT OF TIMBER PRIVILEGES UNDER ACT OF FEBRUARY 20, 1896.

(29 Stat., 11.)

Commissioner of the General Land Office to the Secretary of the Interior, October 16, 1896, in the timber trespass case of Kendall, Townsend, and Walter.

* * * * * * *

Inasmuch as the act of February 20, 1896 (29 Stat., 11), opening the Pikes Peak Forest Reserve for the location of mining claims, confines the felling and removing of timber from mining claims to "actual mining purposes in connection with the particular claim from which the timber is felled or removed," it appears that Townsend and Walter, in cutting timber on their claims for sale for the purpose of raising money for the development of the claims, exceeded the privileges allowed in said act.

A reasonable construction of the wording of this act appears to con-

fine the use of timber on such claims within a limit directly similar to that defined by the United States Supreme Court in dealing with the question whether timber might be taken from an unperfected homestead claim and sold for the purpose of expending the money derived from the sale in improvements on the claim; upon which point it was held that while, perhaps, timber might be taken from such claims to be exchanged for timber or lumber to be applied direct to improvements thereon, yet it could not be sold to raise money with which to make improvements on the land. (Case of Shiver *v.* United States, 159 U. S., 491.)

It accordingly appears that the timber taken from said mining claims for use as stated was procured in trespass.

* * * * * * *

Approved by the Secretary of the Interior November 5, 1896.

THE SECRETARY OF THE INTERIOR AUTHORIZED TO PRESCRIBE RULES AND REGULATIONS GOVERNING THE USE OF PUBLIC TIMBER.

[Act of Mar. 3, 1891; 26 Stat., 1093.]

AN ACT to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended so as to read as follows:

"SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands, or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act; and he

may designate the sections or tracts of land where timber may be cut; and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands."

The above act of March 3, 1891 (26 Stat., 1093), was made applicable to the Territories of New Mexico and Arizona by the act of February 13, 1893 (27 Stat., 444), and to the States of California, Oregon, and Washington by the act of March 3, 1901 (31 Stat., 1436).

CIRCULAR.

(29 L. D., 572.)

RULES AND REGULATIONS GOVERNING THE USE OF TIMBER ON NONMINERAL PUBLIC LANDS IN CERTAIN STATES AND TERRITORIES UNDER THE ACT OF MARCH 3, 1891 (26 STAT., 1093), AS EXTENDED BY THE ACT OF FEBRUARY 13, 1893 (27 STAT., 444).

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 10, 1900.

By virtue of the power vested in the Secretary of the Interior by the act of March 3, 1891 (26 Stat., 1093), the following rules and regulations are hereby prescribed:

1. The act, so far as it relates to timber on public lands, as extended by the act of February 13, 1893 (27 Stat., 444), applies only to the States of Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, Nevada, and Utah and the Territories of Arizona and New Mexico. The act originally extended to the district of Alaska, but in that respect it has been superseded by section 11 of the act of May 14, 1898 (30 Stat., 409), under which other and separate regulations are prescribed for the district of Alaska.

2. The intention of the act of March 3, 1891, is to enable settlers upon public lands and other residents within the States and Territories above named to secure from public timber lands timber or lumber for agricultural, mining, manufacturing, or domestic purposes, for use in the State or Territory where obtained, under rules and regulations to be made and prescribed by the Secretary of the Interior.

3. Settlers upon public lands and other residents of the States and Territories above named may procure timber free of charge from unoccupied, unreserved, nonmineral public lands within said States and Territories, strictly for their own use for firewood, fencing, building, or other agricultural, mining, manufacturing, or domestic purposes, but not for sale or disposal, nor for use by other persons, nor for export from the State or Territory where procured. The cutting or removal

of timber or lumber to an amount exceeding in stumpage value $50 in any one year will not be permitted, except upon application to the Secretary of the Interior and after the granting of a special permit. Except as above provided, it is not necessary for actual residents to secure permission to take timber from public lands in said States and Territories for the purposes aforesaid. The exercise of such privilege is, however, subject at all times to supervision by the Department with a view to such restriction as may be deemed necessary.

4. In cases where qualified persons are not in position to procure timber from the public lands themselves, it is allowable for them to secure the cutting, removing, sawing, or other manufacture of the timber through the medium of others upon an agreement with the parties thus acting as their agents that they shall be paid a sufficient amount only to cover their time, labor, and other legitimate expenses incurred in connection therewith, exclusive of any charge for the timber itself; but no person, whether acting for himself, as an agent for another, or otherwise, will be permitted to cut or remove in any one year timber or lumber to an amount exceeding in stumpage value $50, except upon application to the Secretary of the Interior, and upon the granting of a special permit.

5. The uses specified in section 3 of these rules and regulations constitute the only purposes for which timber may be taken from public lands in said States and Territories under this act.

6. The cutting and removing of timber, free of charge, under said act of March 3, 1891, is confined to unreserved, unoccupied, nonmineral public lands in the States and Territories named therein, inasmuch as the act specifically provides that the same shall not operate to repeal the act of June 3, 1878 (20 Stat., 88), which makes provision, in said States and Territories, for the free cutting of timber on public lands that are known to be of a strictly mineral character for the uses named in said act.

7. It is further provided in said act of March 3, 1891, that "nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain." Consequently no timber may be cut or taken under this act from public lands either by or for the use of any railroad company.

8. Section 2461, United States Revised Statutes, is still in force in the States and Territories herein named, and its provisions may be enforced against any person or persons who cut or remove, or cause or procure to be cut or removed, or aid or assist or are employed in cutting or removing, any timber from public lands therein, except as allowed by law.

9. The Secretary of the Interior reserves the right to revoke the privileges granted, in any cases wherein he has information that persons are abusing the same, or when it is necessary for the public good.

10. All rules and regulations heretofore prescribed under said act of March 3, 1891, relating to the use of timber on public lands in the above-named States and Territories, are hereby revoked.

W. A. RICHARDS,
Acting Commissioner.

Approved, February 10, 1900.
E. A. HITCHCOCK,
Secretary.

[Act of Feb. 13, 1893; 27 Stat., 444.]

AN ACT to extend the provisions of section eight of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, concerning prosecutions for cutting timber on public lands to Wyoming, New Mexico, and Arizona.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, as amended by an act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page ten hundred and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended as follows: After the word "Wyoming," in said amended act, insert the words "New Mexico and Arizona."

CIRCULAR.

(30 L. D., 542.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1901.

To special agents of the General Land Office.

GENTLEMEN: The act of Congress approved March 3, 1901 (31 Stats., 1436), provides "That section eight of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, as amended by an act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page ten hundred and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended as follows: After the word 'Nevada,' in said amended act, insert the words 'California, Oregon, and Washington.'"

This act extends to residents of the States of California, Oregon, and Washington the privilege of taking timber from public lands in said States under the provisions of said act of March 3, 1891.

In taking such timber the rules and regulations contained in the circular of February 10, 1900 (29 L. D., 572), prescribing "rules and

regulations governing the use of timber on nonmineral public lands in certain States and Territories, under the act of March 3, 1891 (26 Stat., 1093), as extended by the act of February 13, 1893 (27 Stat., 444)," must be observed and the timber must be taken for the purposes specified in said circular.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved, March 22, 1901.
E. A. HITCHCOCK,
Secretary.

CIRCULAR.

(27 L. D., 276.)

EXPORT OF PUBLIC TIMBER FROM WESTERN WYOMING INTO IDAHO.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 23, 1898.

1. The act of Congress approved July 1, 1898, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-nine, and for other purposes," provides as follows:

That section eight of an act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended as follows: "That it shall be lawful for the Secretary of the Interior to grant permits, under the provisions of the eighth section of the act of March third, eighteen hundred and ninety-one, to citizens of Idaho and Wyoming to cut timber in the State of Wyoming west of the continental divide, on the Snake River and its tributaries to the boundary line of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to the State of Idaho."

2. Under the authority vested in the Secretary of the Interior by the above-cited act of July 1, 1898, the following amendment to the rules and regulations issued March 17, 1898, under the said act of March 3, 1891 (26 Stat., 1093), is hereby prescribed and promulgated:

The restriction contained in said rules and regulations of March 17, 1898, confining the use of timber cut thereunder to the State in which the same is cut, is so far modified as to allow citizens of Idaho and Wyoming to cut timber in the State of Wyoming west of the continental divide, on the Snake River and its tributaries to the boundary line of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to the State of Idaho.

BINGER HERMANN,
Commissioner.

Approved, July 23, 1898.
THOS. RYAN,
Acting Secretary.

(30 L. D., 540.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 20, 1901.

To special agents of the General Land Office.

GENTLEMEN: The act of Congress approved March 3, 1901, entitled "An act to amend chapter five hundred and fifty-nine of the Revised Statutes of the United States, approved March third, eighteen hundred and ninety-one," provides as follows:

That the provisions of chapter five hundred and fifty-nine of the Revised Statutes of the United States, approved March third, eighteen hundred and ninety-one, limiting the use of timber taken from public lands to residents of the State in which such timber is found, for use within said State, shall not apply to the south slope of Pryor Mountains, in the State of Montana, lying south of the Crow Reservation, west of the Big Horn River, and east of Sage Creek; but within the above-described boundaries the provisions of said chapter shall apply equally to the residents of the States of Wyoming and Montana, and to the use of timber taken from the above-described tract in either of the above-named States.

Said act extends to citizens of Montana and Wyoming the privilege of taking timber under the provisions of said act of March 3, 1891, from the tract specified in the State of Montana for use in either of said States.

In taking such timber the rules and regulations prescribed by the circular of February 10, 1900 (29 L. D., 572), containing "rules and regulations governing the use of timber on nonmineral public lands in certain States and Territories under the act of March 3, 1891 (26 Stat., 1093), as extended by the act of February 13, 1893 (27 Stat., 444)," must be observed, and the timber must be taken for purposes specified in said circular.

Very respectfully,
BINGER HERMANN,
Commissioner.

Approved.
E. A. HITCHCOCK,
Secretary.

The act of March 3, 1891 (26 Stat., 1093), and the acts amendatory thereof, apply exclusively to such public lands as are nonmineral.

The act of June 3, 1878 (20 Stat., 88), and the rules and regulations prescribed thereunder by the Department of the Interior January 18, 1900 (see page 68), provide for the taking of timber from public mineral lands for certain specified purposes within the States and Terriries named therein.

Parties who take timber from the public lands under assumed authority of said act of June 3, 1878, do so at their own risk, and must stand prepared to show that their acts are within the prescribed terms of the act granting such privilege; in other words, the burden

is on such parties of proving by a preponderance of evidence that the land from which the timber is taken is "mineral" within the meaning of said act, should the question at any time be raised as to the character of the land.

SALE OF TIMBER—ACT OF MARCH 3, 1891.

J. W. McCUTCHEN ET AL.

(29 L. D., 322.)

The sale of timber on unreserved public lands is not authorized by the act of March 3, 1891 (26 Stat., 1093).

Assistant Attorney-General Van Devanter to the Secretary of the Interior, November 27, 1899.

By letter of September 9, 1899, the Commissioner of the General Land Office transmitted to the Department, and favorably recommended the allowance of, the separate applications of J. W. McCutchen and Charles H. Dudley for a permit under the act of March 3, 1891 (26 Stat., 1093), and the regulations thereunder, approved March 17, 1898 (26 L. D., 399), to purchase, cut, remove, and dispose of timber from sections 4 and 5 and the E. ½ of sec. 6, T. 14 S., R. 69 W., sixth principal meridian, in Teller County, Colorado, the same being unreserved public timber lands.

By your reference of November 14, 1899, I am asked for an opinion whether the sale of timber on unreserved public lands under said circular of March 17, 1898, is authorized by the act of March 3, 1891, *supra*, on which said circular is based.

The said act of March 3, 1891, amends another act of that date (26 Stat., 1095, 1099), entitled "An act to repeal timber-culture laws, and for other purposes," and is in part as follows:

> And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming [New Mexico and Arizona, by the act of February 13, 1893, 27 Stat., 444], and the district of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain: *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

There is nothing in this act which suggests that it was the purpose of Congress to thereby authorize or provide for the sale of timber on the public lands. As gathered from a careful examination of the terms of the act, its purpose seems to have been to modify the law relating to the cutting and removal of timber from lands of the United States by denying to the Government the right then existing to demand a conviction in a criminal prosecution, or a recovery in a civil action, when in any of the States, Territories, or regions named timber is cut or removed from the public timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and is not transported out of that State or Territory.

Section 2461 of the Revised Statutes contained a general prohibition against cutting or removing timber from the lands of the United States and imposed penalties for its violation. It was to avoid the effect of this statute, in instances deemed by Congress to be meritorious, that the act under consideration was enacted. It must be construed with section 2461 as if their several provisions appeared in one act, one part of which in general terms prohibited the cutting or removing of timber from the lands of the United States and the other part of which authorized the cutting and removing of such timber in specified localities by designated persons for enumerated purposes, under rules and regulations to be made and prescribed by the Secretary of the Interior. The act says nothing about selling timber or collecting any compensation or price for that which is cut or removed under the statute and the regulations prescribed thereunder, and it seems to me that authority on the part of the Secretary of the Interior to sell such timber or to make the right or privilege of cutting or removing the same dependent upon payment therefor can not be implied from the general authority given to him to prescribe rules and regulations to carry out the provisions of the act.

I am of opinion that the legislation under consideration does not authorize the sale of timber, and inasmuch as the regulations of March 17, 1898, *supra*, provide for sales thereof, I advise that said regulations be reformed and brought within the authority given the Secretary of the Interior by the statute under which they were prescribed.

Approved, November 27, 1899.

E. A. Hitchcock,
Secretary.

CIRCULAR—FOREST FIRES.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 18, 1900.

For the information of all concerned, attention is called to the following act of Congress, approved May 5, 1900, entitled "An act to amend an act entitled 'An act to prevent forest fires on the public domain,' approved February twenty-fourth, eighteen hundred and ninety-seven."

Registers and receivers, United States land offices, special agents, and forest officers, General Land Office, should promptly report to the proper United States attorney all information they may receive relative to the violation of the provisions of this law.

BINGER HERMANN,
Commissioner.

Approved, June 18, 1900.
E. A. HITCHCOCK, *Secretary.*

[31 Stats., 169.]

AN ACT to amend an act entitled "An act to prevent forest fires on the public domain," approved February twenty-fourth, eighteen hundred and ninety-seven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act to prevent forest fires on the public domain," approved February twenty-fourth, eighteen hundred and ninety-seven, be, and the same is hereby, amended so as to read as follows:

"That any person who shall willfully or maliciously set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall leave or suffer fire to burn unattended near any timber or other inflammable material, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States having jurisdiction of the same shall be fined in a sum not more than five thousand dollars or be imprisoned for a term of not more than two years, or both.

"SEC. 2. That any person who shall build a fire in or near any forest, timber, or other inflammable material, upon the public domain shall, before leaving said fire, totally extinguish the same. Any person failing to do so shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court in the United States having jurisdiction of the same shall be fined in a sum not more than one thousand dollars, or be imprisoned for a term of not more than one year, or both.

"SEC. 3. That in all cases arising under this act the fines collected

shall be paid into the public school fund of the county in which the lands where the offense was committed are situated."

Approved, May 5, 1900.

CRIMINAL PROCEEDINGS.

In addition to the penalties prescribed in the above act, section 4 of the act of June 3, 1878 (20 Stat., 89), provides that "it shall be unlawful to" * * * "wantonly destroy any timber growing on any lands of the United States" in "the States of California, Oregon, and Nevada and in Washington Territory;" and "any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars." (See act cited in full on page 98.)

This act is made applicable to all the public-land States by the act of August 4, 1892 (27 Stat., 348; see page 101).

CIVIL REMEDIES.

In addition to the wanton destruction of public timber by fire, or otherwise, being a criminal offense, the United States have all the common-law civil remedies, whether for the prevention or redress of injuries, which individuals possess. (See 3 Wheaton, 181, and 11 Howard, 229, under "Civil liability," page 23.)

The following notice was prepared for posting generally throughout the forests on the public lands and in forest reserves:

FOREST FIRES! WARNING!

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 27, 1902.

Large areas of forest, public and private, are destroyed each year by fire. This destruction is an injury to everyone, and is a great damage, especially in all mountain countries, where a regular flow of the streams is of vital importance. The forest is the most effective means of preventing floods and producing a more regular flow of water for irrigation and other useful purposes.

To prevent the mischievous forest fires Congress passed the law approved May 5, 1900, which—

Forbids setting fire to the woods, and

Forbids leaving fires, camp fires, and others, without first extinguishing the same.

This law provides a maximum punishment, in—

A fine of $5,000 or imprisonment for two years, or both, if a fire is set maliciously, and

A fine of $1,000 or imprisonment for one year, or both, if fire results from carelessness.

It also provides that the money from such fines be paid to the school fund of the county in which the offense is committed.

Directions.—Since so many fires start from neglected camp fires, the public is requested as follows:

1. Do not build a larger fire than you need.

2. Do not build your fires in dense masses of pine leaves, duff, and other combustible material where the fire is sure to spread.

3. Do not build your fire against large logs, especially large rotten logs, where it requires much more work and time to put the fire out than you are willing to expend, and where you are rarely quite certain that the fire is really and completely extinguished.

4. In windy weather and in dangerous places dig a fire hole and clear off a place to secure your fire. You will save wood and trouble.

5. Every camp fire should be completely put out before leaving camp.

6. Do not build fires to clear off land and for other similar purposes without informing the nearest ranger or the supervisor, so that he may assist you.

These warning notices are posted for your benefit and the good of every man in and near this forest, and it is hoped, therefore, that everyone will see that they remain intact and useful as long as possible.

BINGER HERMANN,
Commissioner of the General Land Office.

Approved:
E. A. HITCHCOCK,
Secretary of the Interior.

TIMBER CIRCULAR.

(24 L. D., 587.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 29, 1897.

To special agents of the General Land Office.

GENTLEMEN: Your special attention is called to the fact that in various acts of Congress relating to timber on the public domain, wherein authority is given to cut or remove such timber for any use or purpose whatever, it is expressly provided that such timber and the products thereof shall be consumed in the State or Territory in which the same is cut, and shall not be exported or transported out of such State or

Territory. Yet numerous complaints have been received in this office that the provisions of law in this respect are being openly, willfully, and flagrantly violated by railroad companies, mining corporations, and others, and that the special agents of this office make little, if any, attempt to prevent same, or to secure evidence upon which this office can recommend the institution of proper legal proceedings against the parties guilty thereof.

You are therefore hereby expressly and imperatively directed to hereafter use your utmost endeavors to detect and prevent any such violations of law in the State or Territory in your charge, and to this end you will visit the several shipping points in the State or Territory in which you are located and make personal inspection of all shipments of timber and logs or any of the products thereof, ascertain the quantity in each shipment, the name of the shipper, and to whom consigned, and all facts in regard to same that can be ascertained, keeping proper and full notes of all information acquired, with names and addresses of witnesses, etc. You will then proceed to trace the timber, or its product, back, as far as possible, to its original condition and the source from which it was procured, and, upon completion of the work, will report all of the facts to this office, on Form 4–478, for its action. Where you have reliable evidence that any timber cut from public lands, or any product of such timber, is being, or about to be, exported or transported out of the State or Territory where cut, you will notify all parties in interest, including the railroad or transportation company, in writing, that such shipment is in violation of law, and forbid them from proceeding further therein, and will report your action to this office, submitting therewith evidence of service of notice on the several parties.

In all such cases where you have knowledge that parties who have permits, or any special authority from this Department, to cut or remove timber on the public domain, are exporting or transporting any timber or any product thereof out of the State or Territory, you will at once report them to this office, in order that their permits or authority can be revoked and canceled.

It is the determination of this Department to put a stop to the exportation or transportation of the public timber or the products thereof from the State or Territory in which the same is produced, and special agents must direct their very best efforts to accomplish this purpose. Any special agent who is found derelict in his duty in this respect will be subject to summary dismissal from the service.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved June 29, 1897.

THOS. RYAN,
Acting Secretary.

TIMBER ON THE COLVILLE INDIAN RESERVATION, IN THE STATE OF WASHINGTON.

(Act of July 1, 1898; 30 Stat., 571, 593.)

* * * * * * *

The right is hereby granted to cut timber for mining and domestic purposes, at such prices and subject to such regulations as may be prescribed by the Secretary of the Interior, from that portion of the Colville Indian Reservation, in the State of Washington, which was vacated and restored to the public domain by the act of July first, eighteen hundred and ninety-two, entitled "An act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes," and the net proceeds arising from the disposition of said timber shall be set apart and disposed of according to the provisions of section two of said act of July first, eighteen hundred and ninety-two, but primarily the expense incident to the disposing of said timber, including compensation of such special agent as the Secretary of the Interior shall appoint, shall be paid out of any existing appropriation for the survey and allotment of said lands, and shall be reimbursed and replaced from the proceeds arising from the disposition of the timber.

* * * * * * *

CIRCULAR.

(27 L. D., 366.)

RULES AND REGULATIONS, UNDER THE ACT OF JULY 1, 1898, AUTHORIZING THE SALE OF TIMBER ON THE PORTION OF THE COLVILLE INDIAN RESERVATION, VACATED BY THE ACT OF JULY 1, 1892 (27 STAT., 62).

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 11, 1898.

By virtue of the power vested in the Secretary of the Interior by the act of July 1, 1898 (Public, No. 175), the following rules and regulations are hereby prescribed:

1. The terms of the act do not grant to settlers, miners, or others the free use of timber from the lands therein designated for mining or other purposes.

2. The right is granted to cut timber for mining and domestic purposes at such price, and subject to such regulations as may be prescribed by the Secretary of the Interior from that part of the Colville Indian Reservation in the State of Washington, which was vacated and restored to the public domain by the act of July 1, 1892 (27 Stat., 62).

3. The sale of timber is optional, and the Secretary may exercise his discretion at all times as to the necessity or desirability of any sale.

4. While sales of timber may be directed by this Department without previous request from private individuals, petitions from responsible persons for the sale of timber in particular localities will be considered. Such petitions must describe the land upon which the timber stands by legal subdivisions if surveyed; if unsurveyed, as definitely as possible by natural land marks; the character of the country, whether rough, steep, or mountainous, agricultural or mineral, or valuable chiefly for its forest growth; and state whether or not the removal of the timber would injuriously affect the public interests. If any of the timber is dead, estimate the quantity in feet, board measure, with the value, and state whether killed by fire or other cause. Of the live timber, state the different kinds and estimate the quantity of each kind in trees, per acre. Estimate the average diameter of each kind of timber, and estimate the number of trees of each kind, per acre, above the average diameter. State the number of trees of each kind above the average diameter it is desired to have offered for sale, with an estimate of the number of feet, board measure, therein, and an estimate of the value of the timber as it stands. These petitions must be filed in the proper local land office, for transmission to the Commissioner of the General Land Office.

5. Before any sale is authorized, the timber will be examined and appraised, and other questions involved duly investigated by an official designated for the purpose; and upon his report action will be based.

6. When a sale is ordered, notice thereof will be given by publication by the Commissioner of the General Land Office; and if the timber to be sold stands in more than one county, published notice will be given in each of the counties, in addition to the required general publication.

7. Within thirty days after notice to a bidder of an award of timber to him, payment must be made in full to the receiver for the timber so awarded; or equal payments therefor may be made in thirty, sixty, and ninety days from date of such notice, at the option of the purchaser. The purchaser must have in hand the receipt of the receiver for each payment before he will be allowed to cut, remove, or otherwise dispose of the timber covered by that payment. The timber must all be cut and removed within one year from the date of the notice by the receiver of the award; failing to do so, the purchaser will forfeit his right to the timber left standing or unremoved and to his purchase money: *Provided*, That the limit of one year herein named may be extended by the Commissioner of the General Land Office, in his discretion, upon good and sufficient reasons being shown.

8. Thirty days' notice must be given by the purchaser to the Commissioner of the General Land Office, of the proposed date of cutting and removal of the timber, so that an official may be designated to super-

vise such cutting and removal. Upon application of purchasers, permits to erect temporary sawmills for the purpose of cutting or manufacturing timber purchased under this act may be granted by the Commissioner of the General Land Office, if not incompatible with public interests. Instructions as to disposition of tops, brush, and refuse, to be given through the special agent in each case, must be strictly complied with, as a condition of said cutting and manufacture.

9. No timber taken from the said public lands and sold as above prescribed may be exported from the State of Washington.

10. Receivers of public moneys will issue receipts in duplicate for moneys received in payment for timber, one of which will be given the purchaser and the other will be transmitted to the Commissioner of the General Land Office in a special letter, reference being made to the letter from the Commissioner authorizing the sale, by date and initial, and with title of case as therein named. Receivers will deposit to the credit of the United States all such moneys received, specifying that the same are on account of sales of public timber on the north half of the Colville Indian Reservation, State of Washington, under the act of July 1, 1898. A separate monthly account-current (Form 4–105) and quarterly condensed account (Form 4–104) will be made to the Commissioner of the General Land Office, with a statement in relation to the receipts under the act as above specified.

11. Special instructions will be issued for the guidance of officials designated to examine and appraise timber, to supervise its cutting and removal, and for carrying out other requirements connected therewith.

12. The Secretary of the Interior reserves the right to prescribe such further restrictions as he may at any time deem necessary, or to revoke the privileges granted, in any cases wherein he has information that persons are abusing the same, or when it is necessary for the public good.

13. A homestead settler, Indian allottee, or miner, who is holding and occupying his settlement, allotment, or mining location in full compliance with the law governing such claim, is allowed to cut therefrom such timber as is required to clear the ground for *prompt* and *bona fide* cultivation, and for building, fencing, and making other improvements upon his claim; and he may exchange it for lumber to be applied to those purposes; but he can not lawfully *sell* the timber for money, or exchange it for supplies, provisions, or use it to pay debts, etc., except so far as it may have been cut for the purpose of speedily cultivating, or mining more conveniently, the ground from which it was severed.

BINGER HERMANN,
Commissioner.

Approved, August 11, 1898.
C. N. BLISS,
Secretary.

OPINION.

(30 L. D., 88.)

The owner of a *bona fide* mining claim in the Colville Indian Reservation has the same right, by virtue of the act of July 1, 1898, extending the mining laws to said reservation, to use and remove the timber upon his claim as the owner of a mining claim elsewhere.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, June 26, 1900.

I am in receipt by your reference, with request for opinion, of a letter from the Commissioner of Indian Affairs of May 24, 1900, relative to the cutting of timber on mining claims on the south half of the Colville Indian Reservation, Washington.

The proposition of the Indian Office is to enter into a contract with the owners of certain mining claims permitting them to place a sawmill plant on such mining claims for the sole purpose of cutting lumber and timber to be used on such claims for the development of the property. A contract to this effect was submitted for your approval, which was refused.

The Indian Office has resubmitted the matter for further consideration, and has presented an argument sustaining the right of mineral claimants on this reservation to cut timber upon their claims and in support of the propriety of making the proposed contract says:

> The Office is aware that there is no law and so far as known no precedent for the making of such agreements with miners. But it is thought that miners and mining companies on that portion of the reservation who are developing properties in good faith will be willing to enter into such arrangements, because risking nothing by violations of the law they will have nothing to lose, whereas timber trespassers and speculators—those locating claims under the guise of miners, only to procure the timber—will thereby be deterred from operating on the reservation at all.

By the act of July 1, 1892 (27 Stat., 62), a portion of the Colville Reservation was "vacated and restored to the public domain." The remaining portion became and remained the Colville Indian Reservation. The act of July 1, 1898 (30 Stat., 571, 593), contains the following provision:

> That the mineral lands only in the Colville Indian Reservation in the State of Washington shall be subject to entry under the laws of the United States in relation to the entry of mineral lands: *Provided*, That lands allotted to the Indians or used by the Government for any purpose or by any school shall not be subject to entry under this provision.

Thus the mineral lands within the boundaries of the present reservation were made subject to location and entry under the mining laws. The owner of a *bona fide* mining claim on these lands therefore has the same right to use or remove the timber found upon his claim which is possessed by the owner of a mining claim situated elsewhere, and this

Department has no more authority to control the exercise of this right in the one case than in the other. This right is not possessed by timber trespassers or speculators, who locate claims "under the guise of miners, only to procure the timber," but is restricted to owners of *bona fide* mining claims and authorizes them to cut timber from their own claims for use in the development or working thereof or to remove such timber when necessary to facilitate the convenient and proper development or working of the claims. This right has long been recognized by Congress and the courts, and is not one which can be withheld or granted by this Department as a matter of discretion; but it is the duty of the officers of the Department to see to it that the right is not abused by those by whom it is possessed and that it is not enjoyed by those who do not possess it. The owner of a *bona fide* mining claim in the Colville Indian Reservation may, for the purposes and to the extent herein specified, lawfully cut or remove timber from his claim in the absence of any contract or agreement with any officer charged with the administration or supervision of Indian affairs, and one who is not the owner of a *bona fide* mining claim in such reservation can not, even if he obtains such a contract or agreement, lawfully cut or remove timber from any lands in said reservation. I am therefore of the opinion that the execution and approval of a contract such as is submitted will not establish, add to, or take from the rights of owners of *bona fide* mining claims in the premises.

Approved.

E. A. Hitchcock,
Secretary.

TIMBER IN ALASKA.

The act of May 14, 1898 (30 Stat., 409), entitled "An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," makes provision for the use of timber upon the public domain in that district as follows:

Section 2 provides—

That the right of way through the lands of the the United States in the district of Alaska is hereby granted to any railroad company, duly organized under the laws of any State or Territory or by the Congress of the United States, which may hereafter file for record with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the center line of said road; also the right to take from the lands of the United States adjacent to the line of said road, material, earth, stone, and timber necesary for the construction of said railroad, etc.

Section 6 provides—

That the Secretary of the Interior is hereby authorized to issue a permit * * * unto any responsible person, company, or corporation, for a right of way over the pub-

lic domain in said district * * * to construct wagon roads and wire rope, aerial, or other tramways, and the privilege of taking all necessary material from the public domain in said district for the construction of said wagon roads or tramways, etc.

Section 11 relates to—

THE TIMBER ON PUBLIC LANDS IN THE DISTRICT OF ALASKA,

and provides:

SEC. 11. That the Secretary of the Interior, under such rules and regulations as he may prescibe, may cause to be appraised the timber or any part thereof upon public lands in the district of Alaska, and may from time to time sell so much thereof as he may deem proper for not less than the appraised value thereof, in such quantities to each purchaser as he shall prescribe, to be used in the district of Alaska, but not for export therefrom. And such sales shall at all times be limited to actual necessities for consumption in the district from year to year, and payments for such timber shall be made to the receiver of public moneys of the local land office of the land district in which said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe, and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office in a separate account, and shall be covered into the Treasury. The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in said district of Alaska by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes.

The regulations prescribed under this section are embodied in the circular issued June 8, 1898, under said act of May 14, 1898, and are as follows (27 L. D., 264):

43. While sales of timber are optional, and the Secretary of the Interior may exercise his discretion at all times as to the necessity or advisability of any sale, petitions from responsible persons for the sale of timber in particular localities will be received by this Department for consideration.

Such petitions must describe the land upon which the timber stands, as definitely as possible by natural landmarks; the character of the country, whether rough, steep, or mountainous, agricultural or mineral, or valuable chiefly for its forest growth; and state whether or not the removal of the timber would injuriously affect the public interests. If any of the timber is dead, estimate the quantity in feet, board measure, with the value, and state whether killed by fire or other cause. Of the live timber, state the different kinds and estimate the quantity of each kind in trees per acre. Estimate the average diameter of each kind of timber, and estimate the number of trees of each kind per acre above the average diameter. State the number of trees of each kind it is desired to have offered for sale, with an estimate of the number of feet, board measure, therein, and an estimate of the value of the timber as it stands.

44. Before any sale is authorized the timber will be examined and appraised. Notice thereof will be given by publication by the Commissioner of the General Land Office.

45. The time and place of filing bids and other information for a correct understanding of the terms of each sale will be given by published notices or otherwise. Timber is not to be sold for less than the appraised value. The Commissioner

of the General Land Office must approve all sales, and he may make allotment of quantity to any bidder or bidders if he deems proper. The right is also reserved to reject any or all bids. A reasonable cash deposit, to accompany each bid, will be required.

46. Within thirty days after notice to a bidder of an award of timber to him payment must be made in full to the receiver for the timber so awarded; or equal payments therefor may be made in thirty, sixty, and ninety days from date of such notice, at the option of the purchaser. The purchaser must have in hand the receipt of the receiver for each payment before he will be allowed to cut, remove, or otherwise dispose of the timber covered by that payment. The timber must all be cut and removed within one year from the date of payment therefor; failing to so do, the purchaser will forfeit his right to the timber left standing or unremoved and to his purchase money: *Provided*, That the limit of one year herein named may be extended by the Commissioner of the General Land Office, in his discretion, upon good and sufficient reasons being shown.

47. Notice must be given by the purchaser to the Commissioner of the General Land Office of the proposed date of cutting and removal of the timber, so that, if practicable, an official may be designated to supervise such cutting and removal. Upon application of purchasers, permits to erect temporary sawmills for the purpose of cutting or manufacturing timber purchased under this act may be granted by the Commissioner of the General Land Office, if not incompatible with the public interests.

48. No timber taken from the public lands and sold as above prescribed may be exported from the district of Alaska.

49. Special instructions will be issued for the guidance of officials designated to examine and appraise timber, to supervise its cutting and removal, and for carrying out other requirements connected therewith.

50. Actual settlers, residents, individual miners, and prospectors for minerals may procure, free of charge, from unoccupied unreserved public lands in Alaska, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, so much timber as may be actually needed by such persons, for individual use, to an extent not exceeding, in stumpage valuation, $100 in any one year. It is not necessary to secure permission from the Department to take timber from public lands as allowed in this paragraph. The exercise of such privilege is, however, subject at all times to supervision by the Department, with a view to restriction or prohibition if deemed necessary. The uses specified in this paragraph constitute the only purposes for which timber may be taken, free of charge, from public lands in Alaska.

51. In cases arising under the preceding paragraph in which the parties needing the timber are not in a position to procure it from the public lands themselves, it is allowable for them to secure the cutting, removing, sawing, or other manufacture of the timber through the medium of others, agreeing with the parties thus acting as their *agents direct* in taking or otherwise handling the timber that they shall be paid a reasonable amount to cover their time and labor expended and all legitimate expenses incurred in connection therewith *exclusive of any charge for the timber itself.*

52. Section 2461, United States Revised Statutes, is in force in the district of Alaska, and its provisions may be enforced against any person or persons who cut or remove, or cause or procure to be cut or removed, or aid or assist or are employed in cutting or removing, any timber from public lands therein, except as allowed by law.

INDEX.

TABLE OF CASES CITED.

ACTS OF CONGRESS CITED AND CONSTRUED.

O